REPORT *of the*
TAMAN
INQUIRY

The Honourable Roger Salhany, Q.C., Commissioner

REPORT OF THE TAMAN INQUIRY

The Honourable Roger Salhany, Q.C.
Commissioner

Library and Archives Canada Cataloguing in Publication

Taman Inquiry into the Investigation and Prosecution of Derek Harvey-Zenk (Man.)
Report of the Taman Inquiry.

Includes bibliographical references.
Commissioner: Roger Salhany
ISBN 978-0-7711-1548-6

1. Harvey-Zenk, Derek. 2. Drunk driving--Manitoba. 3. Criminal investigations--Manitoba. 4. Governmental investigations--Canada. 5. Police misconduct--Manitoba I. Title.

HV 8079 .D76 .T36 2008 364.1'47 C2008-962003-8

Errata for the Report of the Taman Inquiry

These errata are corrections from the printing that were missed in the original report.

1. Page 19, 1st paragraph under the heading "East St. Paul Police's Compliance", 3rd line should read **Sveinsons** instead of Sviensons.
2. Page 20, 2nd paragraph under the heading "Victim Service Workers' Compliance", 1st line should read **Sveinsons** instead of Sviensons.
3. Page 21, 2nd paragraph, 3rd line should read **Sveinsons** instead of Sviensons.
4. Page 126, 4th paragraph, 2nd line should read **Sveinn** did not … instead He did not…
5. Page 133, 3rd paragraph, 1st line after the word Canada should read does **not** move … instead of does move… .
6. Page 139, 1st paragraph under point 6, 1st line after the word experienced should read criminal **lawyers** instead of criminal lawyer.

We apologize if there are other typing errors that have been overlooked.

Taman Inquiry into the investigation and prosecution of Derek Harvey-Zenk

Honourable Roger Salhany, Q.C., Commissioner
Room 30 - 200 Vaughan Street, Winnipeg, MB R3C 1T5 Tel: 204-945-7544 Fax: 204-948-2522

September 30, 2008

Honourable David Chomiak
Minister of Justice & Attorney General
Manitoba Justice
104 – 450 Broadway
Winnipeg, MB R3C 0V8

Dear Mr. Attorney,

Re: Taman Inquiry

I am pleased to forward to you my Report as requested by the Order in Council.

Thank you for the opportunity to have served as Commissioner.

Yours very truly,

Honourable Roger Salhany, Q.C.
Commissioner

Enc.

cc: Mr. Jeffrey Schnoor, Q.C.
Deputy Minister of Justice & Deputy Attorney General

ACKNOWLEDGMENTS

Many people contributed to the important task of this Commission. Their competence, efforts and dedication to the work that had to be done are very much appreciated.

I was fortunate to have Mr. David Paciocco as Commission Counsel and Mr. Vincent Clifford as Associate Commission Counsel. They immediately commenced preparation for the hearings by interviewing witnesses and causing investigation to be made for the purpose of ascertaining the truth in regard to the matters to be enquired into and reported upon. Both contributed their knowledge and skills unstintingly. I wish to express my appreciation of the most capable manner in which they prepared and presented the evidence.

The co-operation, skill and professionalism of every counsel who appeared at the Inquiry were of great help.

Robert Giasson, the Chief Administrative Officer and Melissa Braun, the Administrative Assistant anticipated and fulfilled our needs and made the Inquiry run smoothly. I am most grateful to each of them for their dedication and hard work, and for their help to me in completing the Report. I also want to express my thanks to Wendy Bergmann and Evelyn Kampen of the Commission staff.

My thanks also to the Clerks, Sharleen Reid, Kim Pohorily and Ainie LeBlanc; to the Reporters, Celia Reid, Debra Kot and Lisa Reid; and to the Sheriff's Officers, Charissa Van Dorp, Kris Hebert, John Stepaniuk, Gerhard Schmidt and Paul Heinl.

I am grateful to all of you.

Roger Salhany, Q.C.
Commissioner

TABLE OF CONTENTS

1. **REPORT SUMMARY..7**

2. **INTRODUCTION..23**
   1. The Order-in-Council..24
   2. The Appointment of Commission Counsel..25
   3. Counsel Granted Standing...25
   4. The Proceedings..25

3. **PART A - THE INVESTIGATION BY THE EAST ST. PAUL POLICE DEPARTMENT...27**

   1. The investigation conducted by the Royal Canadian Mounted Police of the accident scene..27
   2. Diagrams of the accident scene..29
   3. Photographs of the accident scene 30
   4. The evidence of Kathleen Beattie..31
   5. The evidence of Garth Shaw...32
   6. The evidence of Tara Taman...33
   7. The evidence of Denise Bukowski...34
   8. The evidence of Edward Rosser and Rolland Fontaine...........................34
   9. Note-making practices of the East St. Paul Police Department...................36
   10. The evidence of Constable Glenda Pedersen.....................................37
   11. The evidence of Constable Kenneth Graham......................................38
   12. The evidence of Constable Jason Woychuk.......................................42
   13. The evidence of Chief Harry Bakema 47
   14. The evidence of Sergeant Cecil Sveinson...49
   15. The evidence of Sergeant Norman Carter..50
   16. The evidence of Constable Bryan Maloney..53
   17. The testimony of Derek Harvey-Zenk...54
   18. The opinion of Sergeant Paul Lobsinger...55
   19. Findings of fact regarding the evidence of Harry Bakema........................55
   20. Findings of fact regarding the evidence of Kenneth Graham.....................59
   21. Findings of fact regarding the evidence of Jason Woychuk......................60
   22. Findings of fact regarding the evidence of Norman Carter.......................61
   23. Findings of fact regarding the evidence of Glenda Pedersen.....................62
   24. Findings of fact regarding the quality of the investigation by the East St. Paul Police Department...62
   25. Recommendations...62

4. **PART B – THE INVESTIGATION BY THE PROFESSIONAL STANDARDS UNIT 67**

1. The party at Branigan's on the evening of February 24 and morning of February 25..67
2. The evidence of the employees of Branigan's about the amount of alcohol consumed by Zenk and by Division 13 officers at Branigan's..67
3. The evidence of the Winnipeg Police Service officers who attended Branigan's..69
4. Findings of fact regarding the amounts of alcohol consumed at Branigan's...71
5. The party at the home of Cst. Sean Black on the morning of February 25...72
6. Finding of fact regarding the amount of alcohol consumed At Black's residence...74
7. The investigation conducted by the WPS Professional Standards Unit........75
8. Findings of fact regarding the quality of the investigation by the Professional Standards Unit..78
9. Recommendations..82

5. **PART C – THE PROSECUTION OF DEREK HARVEY-ZENK............85**

1. The appointment of Martin Minuk to prosecute Zenk............................85
2. Allegations of conflict of interest by Martin Minuk..............................85
3. The decision by Martin Minuk to release Zenk on a Promise to Appear without conditions...86
4. Testimony about the contact between Martin Minuk and Manitoba Justice...88
5. The decision of Martin Minuk to enter into a plea bargain with Wolson...91
6. The nature of a plea bargain and a joint submission or recommendation......92
7. The events leading up to the plea of guilty by Derek Harvey-Zenk to dangerous driving causing death and the staying of the other charges..93
8. The confusion as to the agreement between Martin Minuk and Richard Wolson...95
9. What the cause of confusion was for Chief Judge Wyant.......................100
10. Was the agreement reached between Minuk and Wolson a true plea bargain 103
11. Was the agreement consistent with Manitoba Crown policy directives and acceptable prosecutorial standards for Minuk to stay charges...105
12. Did Minuk act independently of Manitoba Justice in the exercise of his discretion to enter into a plea bargain..........................106

6. PART D – COMPLIANCE WITH THE MANITOBA *VICTIMS' BILL OF RIGHTS*..111

1. The historical role of a victim in a prosecution....................................111
2. Duties and obligations imposed upon a law enforcement agency by The Manitoba *Victims' Bill of Rights*....................................113
3. Contact by the East St. Paul liaison officer with the victim....................115
4. Whether there was compliance by the East St. Paul liaison officer with *The Victims' Bill of Rights*..117
5. Duty and obligations of the prosecution to victims under the Manitoba *Victims' Bill of Rights* 117
6. Contact by the prosecution liaison officer with the victim......................118
7. Whether there was compliance by the liaison officer with *The Victims' Bill of Rights*..120
8. Contact by the independence prosecutor with the victim........................121
9. Whether there was compliance by the independent prosecutor with *The Victims' Bill of Rights*..128
10. Recommendations..129

7. SYSTEMIC ISSUES RELATING TO NOTE-MAKING BY THE POLICE..133

8. SUMMARY OF RECOMMENDATIONS 139

9. APPENDIX 143

Appendix A – Order-in-Council for the Inquiry
Appendix B – Inquiry Witness List
Appendix C – Inquiry Exhibits List
Appendix D – Inquiry Exhibits 208 and 209
Appendix E – Member of the Inquiry Commission

REPORT SUMMARY

Shortly after 7:00 a.m. on February 25, 2005 Derek Harvey-Zenk drove his light duty truck into the rear of Crystal Taman's small yellow convertible as she sat waiting for a traffic light to change. The collision drove Crystal Taman's vehicle into Kathleen Beattie's dark green car, which had stopped at the same light. Zenk did not even try to stop. On a clear morning on a ribbon straight road this off-duty police officer, who was driving home after a night-long party with police colleagues, drove at highway speed for at least 15 seconds, past flashing warning lights towards brake lights and a red light, until his truck crushed Crystal Taman's vehicle. She died instantly. The collision not only took the life of this well-loved woman, it set off a chain of events so controversial that they led to my appointment as a Commissioner of Inquiry.

Of course, Zenk's status as a police officer should have been an irrelevancy. Without doubt, though, from the time he was investigated until the time he was ultimately convicted of the offence of dangerous driving causing death and given a conditional sentence, Zenk's status as a police officer had a profound effect on events. Most disturbingly, it affected the way the East St. Paul Police Service investigation was conducted, if not "misconducted." It was Zenk's status as a police officer that led to the involvement of the Winnipeg Police Service Professional Standards Unit. And it was Zenk's status as a police officer that led to the appointment of an independent prosecutor, Martin Minuk, and then cast a shadow of suspicion over the decisions Martin Minuk made. Had the driver of the truck not been a police officer, it is certain that I would not be writing this report. Still, good should come from this tragedy. This Commission of Inquiry has exposed misconduct by some, and it has cast a light on systemic practices and habits that are sorely in need of change, and it is change that I recommend.

The Police Investigations

I have been asked, as part of my mandate, to inquire into the conduct of the police investigations surrounding the death of Crystal Taman. Because of public apprehension that Zenk received partial treatment as a police officer, that mandate extends not only to the "correctness and adequacy of the procedures and practices that were followed" but also to the "good faith, objectiveness and professional standards with which the procedures and practices were applied and decisions made."

There were, in fact, two separate investigations that require examination, the investigation of the accident itself conducted by the East St. Paul Police Service, and the investigation by the Winnipeg Police Service Professional Standards Unit into the activities of Zenk prior to the collision. The evidence I heard relating to this part of my mandate was distressing. It showed the East St. Paul Police Service investigation to be riddled with incompetence. Sadly, in the case of Chief Harry Bakema, Constable Ken Graham and Constable Jason Woychuk, aspects of the investigation were also conducted in bad faith. By contrast, the evidence left me with no reservations about the good faith of the Winnipeg Police Service Professional Standards Unit investigation. It was conducted honestly, but in truth, it was conducted poorly, so poorly in fact that it cast a light on a broader systemic problem. It showed the perils of having police officers investigate, or even interview, other police officers from their own force in criminal cases. Both the loyalty so important in permitting officers to rely on one another in moments of peril, and the importance of maintaining morale and the repute of one's own police force positively, undermine our ability to rely on internal police investigations.

The East St. Paul Police Investigation

When the emergency call reached the East St. Paul Police Service, the two constables on duty, Cst. Ken Graham and Cst. Glenda Pedersen, scrambled to their police vehicles. So, too, did Cst. Jason Woychuk even though he had just finished his regular shift. Given the description of the horrid accident that had been received in the emergency call, even Police Chief Harry Bakema decided to attend, jumping into Graham's police car. Three police vehicles raced off to the accident scene, all taking different routes.

Unfortunately, my ability to make comprehensive findings about exactly what unfolded at the accident scene has been compromised by the abysmal note taking practices of the attending officers. It has also been frustrated by the untrustworthy and inconsistent testimony furnished to me by Bakema, Graham, and to a lesser extent, by Woychuk. And it has been compromised by the disturbing memory loss claimed by Zenk at this Inquiry, a claim contradicted by a medical report that had been filed by Zenk and adopted by him at his own sentencing hearing which said "there was no evidence of... memory loss."

In spite of the challenges posed by the state of evidence, it is clear that when the officers arrived, no one took proper charge of the accident investigation. Basic tasks such as identifying witnesses, securing evidence from the scene, and investigating the possibility of criminal conduct were either not undertaken or done ineffectively. Bakema should have taken charge as the ranking officer on site but failed to do so, and he seemed oblivious in his testimony before me of the importance of doing so.

One of the central factual disputes before me related to the nature and extent of Bakema's interaction with Zenk at the scene. What was not contested is that shortly after his arrival Bakema approached Zenk. Zenk was at his truck, which had come to rest after the collision on a snow embankment south of the intersection. It was also uncontested that after spending some time with Zenk, Bakema walked Zenk to the intersection and placed him in Woychuk's police vehicle. I am convinced that Bakema gave false testimony about the nature of this encounter. It was far more extensive and meaningful than he allowed.

There is little doubt that Zenk and Bakema knew each other. They had worked together at the Winnipeg Police Service for at least 18 months only three years before, although not on the same shift. Bakema was the Sergeant of a platoon and would have had regular occasion to be present when Zenk was there. It is almost certain that on occasion he even supervised Zenk during overlap periods. In spite of this, Bakema tried to claim in his evidence that he did not recognize Zenk during their meeting at the truck. He said he hardly spoke with Zenk, asking him but two questions before guiding a hunched over, largely unresponsive Zenk to Woychuk's vehicle. Bakema's notes represent that Bakema was with Zenk for only two minutes, from 7:40 a.m., when Bakema says he first went to the truck, to 7:42 a.m. when he deposited Zenk into the police vehicle. Bakema claimed that he did not recognize Zenk until shortly before arriving at Woychuk's vehicle, a recognition triggered by Zenk saying: "I am a cop." This prompted Bakema to reply "Derek?"

Yet the testimony of accident eye witnesses Garth Shaw (Shaw) and Kathleen Beattie both contradict the claim that theirs was a fleeting encounter. Shaw and Beattie witnessed a protracted conversation between Bakema and Zenk at the truck. Moreover, Bakema's notes, describing the two-minute window, have been falsified. Bakema did not wait until 7:40 a.m. to go over to the truck. By that time Bakema had already deposited Zenk in the truck. We know this because Selkirk Ambulance Service paramedics were attending to Zenk in Woychuk's vehicle before 7:40 a.m., and in his testimony, Bakema admitted to going over to Zenk within minutes of his arrival at the accident scene. I have no doubt that Bakema was with Zenk far longer than he says.

I am also satisfied that Bakema gave false evidence about what happened when he brought Zenk to Woychuk's vehicle. Bakema claimed that when he gave custody of Zenk to Woychuk, he told Woychuk to see if he could smell any alcohol. This simply did not happen. The claim is contradicted by Bakema's own notes, which record other reasons for putting Zenk in Woychuk's vehicle. Had he put Zenk there for investigative purposes, his notes would have said so. Woychuk adamantly and persuasively denies that he was told to smell for alcohol. Bakema fabricated this account when faced with an obstruction of justice investigation by the RCMP and he tried to maintain this story before me.

In spite of its challenges, I find that the evidence does reveal that Bakema in fact told Woychuk several key things. First, he communicated to Woychuk that Zenk had consumed alcohol. It is not clear exactly what he said, as Woychuk has variously said or testified that he was told by Bakema that Zenk was "possibly impaired," or "impaired," or "pissed." In spite of the varied descriptions he has used, I believe Woychuk on this point. His evidence is supported by the testimony of Cecil Sveinson, a Winnipeg Police officer who was Crystal Taman's cousin. Cecil Sveinson testified that he went to the collision scene after learning of Crystal Taman's death, to perform a spiritual ceremony. He met with Bakema, whom he knew. Bakema told Cecil Sveinson that the driver who killed Crystal was "pissed," the same expression that Woychuk attributed to Bakema when Woychuk ultimately disclosed for the first time what Bakema had said to him. He also told Cecil that: "We had to get him out of here right away."

I am satisfied that Bakema spoke words to Woychuk disclosing that Zenk had consumed alcohol. The inference is irresistible that in his close physical dealings with Zenk, Bakema likely smelled what every other person who came into close proximity with Zenk smelled, namely alcohol.

The second important thing that Bakema told Woychuk was to wait for Sergeant Norm Carter to arrive. The expectation that Carter was coming and had been summoned to the scene by Bakema is borne out by the evidence of Graham and Carter.

The third thing Woychuk was told by Bakema was "not to do anything." And Woychuk did as instructed – nothing. He did nothing to investigate whether Zenk had committed an alcohol driving offence, even after a paramedic, who later attended to Zenk, signalled to Woychuk that Zenk had been drinking. After a long delay, Woychuk took Zenk to the police station, on Bakema's instructions.

It is clear that Bakema's conduct, indeed his misconduct, had a devastating effect on the ability of a prosecutor to proceed with alcohol related charges against Zenk. Without question, Zenk was "detained" by Bakema. His Charter rights should have been read to him without delay. Observations of his condition should have been noted by Bakema but were not, opening the door for any future defence counsel to ask: "If Zenk was impaired, then why did Bakema not notice anything? And if he was impaired, why was Zenk not processed at the scene by Woychuk?" Bakema's conduct and Woychuk's decision to follow Bakema's direction would almost certainly have created a reasonable doubt in any alcohol-based prosecution.

It has been suggested that Bakema sloughed the investigation off to Woychuk, the most junior officer at the scene, because Bakema did not want to play a role in Zenk's conviction. Evidence before me does show that Bakema was sympathetic to Zenk. He was very troubled that Zenk's career and future would be damaged by what had occurred. Bakema surely did have a motive to abdicate his responsibility and leave it to Woychuk to do the dirty work. The evidence, however, contradicts the theory that Bakema did not want to be involved. He in fact stayed heavily involved in the investigation, interviewing witnesses and directing officers. What, then, was his motive in acting as he did at the accident scene? Was it to leave Zenk in Woychuk's vehicle in order to sober up? Was his intention to obstruct the investigation? Paragraph 3 of the Order in Council prevents me from expressing an opinion on this. What is clear is that Bakema did not act in good faith in the way he conducted the investigation.

Bakema, of course, would not admit what he had done in his notes or reports. I am satisfied that Bakema not only falsified his own notes and reports to create a false impression of his own actions, he also prompted Woychuk to falsify his notes. Bakema told Woychuk not to record his comments about Zenk's condition; not to mention that an ambulance attendant smelled alcohol; and to claim that the reason Woychuk took Zenk to the station was to fill out a Traffic Accident Report, when the real reason was to get Zenk away from the scene, as he told Cecil Sveinson. Although Woychuk could not recall it, it is likely that Bakema prompted Woychuk to put the 7:42 a.m. time in his notes. It defies coincidence that they would both have independently arrived at this same, erroneous time.

What Woychuk did in following Bakema's direction was wrong. He understands that. It is important to appreciate, however, that he was a brand-new officer who, on the evidence before me, had never received proper on-the-job training. Woychuk was placed in an impossible position by his Chief of Police and does not warrant any further censure than his conscience has already imposed on him.

Evidence shows that Bakema's duplicity was not confined to his own notes and his improper conduct relative to Woychuk. Bakema and Graham collaborated in preparing their police notes so that their notes would create a false picture of an uneventful investigation. This is clear, in spite of their denials to the contrary from examining their notes together and comparing Bakema's two sets of notes. Together Bakema and Graham painted a misleading picture.

The evidence before this Inquiry does raise the spectre that Graham may himself have had dealings with Zenk that were never recorded or admitted. Beattie and Tara Taman, one of two of daughters of Crystal Taman who came upon the accident scene, saw more than one police officer with Zenk. Moreover, Pedersen's evidence contradicts Graham's claim that he had gone north of the intersection to direct traffic at the time Bakema was approaching Zenk. It is suspicious that although Graham testified that he smelled alcohol in Zenk's truck, he never recorded it in his notes, and never logged the police uniform he took from Zenk's truck, nor did he ever record that he had done so. I am convinced that Graham considered himself to be part of a cover-up. His "after-the-fact conduct" before this Commission shows this to be so. Graham accosted Cst. Bryan Maloney in the hallway of the Conference Centre before Maloney was called to testify, and said to him that he and the other police witnesses who were testifying were "nothing but a bunch of f... traitors." While his conduct in falsifying his notes and in reproaching a witness to this Commission were acts of bad faith, there was insufficient evidence before me to support firm findings about the actual role Graham played at the accident scene. I do not know what part he played in the events of that morning, but I do know it was not as innocent as he would have had us believe.

When Zenk was finally brought to the East St. Paul Police Station, Carter took over. He is the one who arrested and processed Zenk. In spite of changes made to his incident narrative, I accept the evidence of Carter. He did not act in bad faith. He did not, however, discharge his responsibilities correctly and adequately. He should have taken greater care in determining the details of the collision before processing Zenk. More problematic was his repeated error in recording that he had made a "blood" demand of Zenk, when he had in fact made a "breath" demand. This compromised the ability of prosecutor Martin Minuk to proceed against Zenk on the refusal to provide a breath sample charge. As well, Carter failed to follow Minuk's direction to secure a search warrant for the sales records of Branigan's Restaurant, and then inexplicably and inexcusably failed to confront Minuk with his reservations about whether a warrant could be secured. He also failed to follow up on Beattie's condition after the accident. Had Carter done so, Zenk could conceivably have faced additional charges for causing her bodily harm.

For her part, Pedersen acted in good faith throughout the investigation, but made a troubling error of her own. She should have noted the observations she made of Zenk's state of impairment when she fingerprinted and photographed him. Her failure to do so exposes a serious lack of understanding about proper note-taking practices.

Based on these findings, explained in further detail in this report, I recommend that the Minister of Justice conduct such further investigation of the conduct of Harry Bakema and Ken Graham as the Attorney General of Manitoba considers advisable.

I also recommend that there be further investigation into the investigative training available to, and the qualifications required of, East St. Paul Police officers.

The Winnipeg Police Service Professional Standards Unit Investigation

It was the Winnipeg Police Service Professional Standards Unit (PSU) that ultimately conducted a significant portion of the criminal investigation of its own member, Derek Harvey-Zenk. Although most of its case load involves the investigation of alleged administrative or employment violations, it is not unusual for the PSU to conduct criminal investigations of its own members. Normally that only happens when crimes are committed by Winnipeg police officers within Winnipeg. But this case was different. This accident investigation fell within the jurisdiction of the East St. Paul Police Service. Initially, the PSU became involved solely to identify any administrative violations that arose out of the conduct of its members in the hours leading up to the collision. Within a few days, however, the PSU offered to assist the East St. Paul Police in the criminal investigation. This occurred after Bakema told the PSU that East St. Paul Police Service was too small to investigate Zenk's activities leading up to the collision.

There is no basis for finding any bad faith on the part of the PSU personnel in the investigation it conducted. Indeed, had it not been for the PSU there may have been no attempt to investigate the activities of Zenk in the hours leading up to the accident. Still, the PSU did not conduct a correct or adequate investigation.

Without question, that investigation was entirely ineffective. Winnipeg Police witnesses painted a picture to the PSU of the "shifter" at Branigan's, where Zenk had been until 2:30 a.m. or so in the morning, as a low-key, staid affair with only moderate alcohol consumption and with, at most, one officer, David Harding, being intoxicated. In fact the evidence before me showed that there was far more drinking going on than was acknowledged by the 23 police witnesses who were interviewed. Commission counsel secured records from Branigan's that showed as much. Those records confirmed the testimony before me of the server, Chelsea O'Halloran, who I have no hesitation in believing, that significant drinking occurred. Even the observation of Darcy Gerardy, the manager, that there were a few officers unfit to drive, was in flat contradiction to the scenario that had been painted by Winnipeg Police witnesses to the PSU. The PSU failed to determine this because the investigators were credulous, even anxious to believe what they were being told. Sergeant Roger Girard of the PSU testified that he was misled into not noticing that Winnipeg Police officers were holding back information. This is because Chelsea O'Halloran had initially lied to the PSU, indicating that everyone was behaving responsibly. A critical examination of her PSU interview should have alerted the investigators, including Girard, to the fact that she was not telling the whole story, and the disclosures made by Gerardy should not have been ignored. The failure of the PSU investigators to secure the records from Branigan's was nothing short of careless.

Moreover, it was wrong for the PSU to interview a key witness like Gerardy in the presence of his employer, Rogrido Bravo. And it was naive for PSU investigators not to note that Bravo, who faced potential civil liability, would have had a motive to downplay the importance of the records, or the amount of alcohol consumed.

I am persuaded that a critical and motivated investigation would have noted how unlikely it was that no one present would have helpful information about Zenk's alcohol consumption. Further, the investigators, uninfluenced by a sense of camaraderie with their witnesses, would have pushed harder.

The same holds true for the investigation of the post-Branigan's get together by 10 officers at Cst. Sean Black's home. The totality of their evidence, that no one could recall whether Zenk was drinking at Black's (with the possible exception of Cst. Jay Nolet's, ambiguous answer), is difficult to accept.

In fairness, it is not clear that the PSU could have uncovered an accurate picture of what went on with a more searching examination. The truth depends on the willingness of witnesses to assist and to put their loyalties and personal agendas aside. What is clear, however, is that the investigative approach adopted by the PSU was bound to fail. The evidence before me showed that there was an uncritical presumption during the PSU investigation that the officers would tell the truth because they were police officers, and that officers should not be pushed or challenged. The interviews that were conducted were *pro forma*, brief in length, cursory and incomplete. Indeed, some were conducted with leading questions that could have had no other effect than to assist officers, if so minded, to claim that they knew nothing helpful.

The problem was not just one of method. No attempt was made to consider whether any of the officers had a motive to mislead or minimize events, even though it was patent that a number did. As a result, even intuitively-suspect claims were accepted at face value.

The picture that is painted is one of an incestuous process that is incapable of uncovering the truth. While I do not find bad faith, it is understandable that there has been public suspicion that the investigation was not intent on disclosing facts that would embarrass the Winnipeg Police Service. That perception could only be fuelled by the inappropriate practice exercised in this case of permitting officers, who are being interviewed in a *criminal* case, to consult first with their union representatives; schedule their interviews to fit their work schedule or holiday time; and then receive warnings or cautions not given to lay witnesses in ordinary police investigations. This is an unflattering picture of special treatment of police witnesses. It is one thing to make these kinds of employment-related concessions in an administrative investigation. It is ill-advised to do so when a criminal allegation is involved. Where a crime is alleged, there should be no compromises on finding out what happened. Yet Girard captured the prevailing ethic when he described a PSU investigation as a balance between the interests of four stakeholders, the citizens of Winnipeg (the public), the city, the force and the members. A criminal investigation should not be the product of compromise. It should serve but one master, the needs of the administration of justice.

Based on my findings in this case, it is graphically demonstrated that internal police investigations are ill-advised in criminal cases. Regardless of how prevalent the practice may be nationally, this case epitomizes why it is simply a bad, if not an intolerable, idea. I will therefore be recommending two things in this report.

First, I recommend that the Minister of Justice give consideration to creating a provincial special investigation unit independent of all police enforcement agencies in Manitoba for the purpose of investigating any alleged criminal activity of a member of the police service.

Second, I recommend that regardless of what form that independent investigative agency takes, it should avoid adopting any procedures that would involve treating police witnesses any differently from the way lay witnesses are treated in criminal investigations. *In criminal investigations,* there should be no special delays to facilitate contact with union representatives, or to accommodate the convenience of police officers, and there should be no special warnings.

The Prosecution of Derek Harvey-Zenk

As part of my mandate, I have been asked to inquire into whether all aspects of the prosecution of Derek Harvey-Zenk were conducted in accordance with the professional and ethical standards expected of lawyers of the Attorney General. With the notable exception of misleading the Taman and Sveinson families on a number of matters, Martin Minuk, the independent prosecutor who handled the Zenk case, acted ethically. Many of the decisions he made did meet the professional standards that the public could fairly expect of lawyers and agents of the Attorney General. His decision to recommend the release of Zenk on a Promise to Appear without conditions met the prevailing standards in the province, and his decision to stay the alcohol-related and criminal-negligence charges that had been laid against Zenk was appropriate.

The plea bargain Minuk made with defence counsel Richard Wolson, however, fell below the standards of lawyers and agents of the Attorney General. Minuk essentially got nothing of value in return for the deal he agreed to, but gave up much. Moreover, he failed to prepare adequately before resigning himself to the deal he made. As a result, he underestimated his case, including the dangerous driving charge to which Zenk pleaded guilty. Minuk's presentation of the plea before Chief Judge Wyant, the presiding judge, was also inadequate and confusing. And he should have proved that Zenk had been consuming alcohol prior to the accident, but instead chose not to. The prevailing view in the case law shows that mere alcohol consumption to be an aggravating factor. Chief Judge Wyant made it clear that he considered alcohol consumption to be an aggravating factor, and the evidence that Zenk had alcohol in his body at the time of the collision was incontrovertible. Those who suggest that there was no evidence capable of doing so are confusing impairment with consumption. For policy reasons, simple consumption without impairment is enough to aggravate dangerous driving.

Within a few hours of the collision, Minuk began to handle the prosecution of Zenk. His appointment, which was formalized a week after he actually began to act as prosecutor, complied in all respects with the policy guidelines developed by the Department of Justice (Manitoba Justice); Zenk was a police officer accustomed to working with Manitoba prosecutors. In order to avoid the appearance of conflict Manitoba Justice policy requires the appointment of someone outside of the Crown's office to prosecute police officers. Minuk was one of four lawyers who were under ongoing retainer with Manitoba Justice to act as independent prosecutors.

I am satisfied that it was appropriate to select Martin Minuk in this case. Complaints from some quarters that he was in a conflict of interest are ill-informed. Neither the fact that Minuk acted for police officers many years before, or that he acted as co-counsel with a shared interest with Wolson in another case, constitute conflicts of interest. It was appropriate for Manitoba Justice to rely on Minuk's established integrity and his professional standing to ensure that the decisions he made would not be influenced by partiality to any of the players.

Minuk's first order of business was to advise Carter on how to process Zenk while Zenk was still in custody. Minuk recommended the charges that should be laid and advised Carter to release Zenk into the custody of his lawyer on a Promise to Appear, without conditions. Evidence before this Commission was that this form of release in alcohol-related fatalities is customary in Manitoba. That being the case, Minuk cannot be faulted for his recommendation.

However, the Manitoba practice is an undesirable one. Zenk was released with no enforceable limits on his behaviour at a time when Carter considered him still to be impaired. While no one could reasonably suggest that Zenk should have been held and then denied bail pending his trial, a far better practice in cases such as his would be for officials in Manitoba to secure conditions containing alcohol and driving prohibitions. These crimes are serious and the public interest demands that such precautions be taken where there are reasonable grounds to believe that a detainee has already, while intoxicated, caused death or serious injury to a citizen.

Without question, the faulty investigation that had been conducted left Minuk with little chance of successfully prosecuting the alcohol related offences. Moreover, the law would have prevented him from securing a criminal negligence causing death conviction. Zenk's driving was dangerous but did not show the wanton or reckless disregard for the lives or safety of others that criminal negligence requires. Minuk was therefore right to stay the charges he did.

While Minuk's decision to do so happened to be right in the result, he did not engage in the due diligence that should have been exercised before taking such momentous decisions. He should not have abandoned his effort to secure the Branigan's records and he should have interviewed key witnesses. The interviews conducted by East St. Paul Police were substantially deficient and Minuk had suspicions that police witnesses had not been forthcoming. He should have taken more care in seeing what he could make out of the evidence.

His failure to exercise due diligence in preparing for the disposition of the charges was not moot simply because he happened to arrive at the right decision on the charges he stayed. A close examination of the evidence would not have permitted Minuk to make the concession that he did on the dangerous driving charge: that the accident could have resulted from a momentary lapse of attention. Evidence showed that Zenk failed to react to the conditions of the road for at least 15 seconds. Minuk's shifting assessment of the fortunes of the dangerous driving charge, in which he variously expressed confidence that he could prove the case, while at other times claiming the case was weak, is deeply troubling. He did not have command over his case. He was obviously unprepared.

In my view, there was simply no reason for Minuk to make concessions relating to the dangerous driving charge by accepting the resolution he did. In spite of Minuk's vacillating appraisals the case was a strong one. Even Wolson thought it was a strong case and estimated that he stood a 10 per cent to 12 per cent chance of defending the dangerous driving charge. The lowest sentence Minuk could have expected after convicting Zenk was a conditional sentence, and a driving prohibition was almost certain to follow. Moreover, there was a real prospect that if he had not agreed to the resolution that he did, Zenk would have received a sentence of incarceration that may better have served the public interest in deterrence and denunciation.

Although the law was not yet in force, Parliament had signalled that the public considers conditional sentences to be undesirable in dangerous driving causing death cases. More importantly, Zenk was a police officer, which surely aggravated the crime. He had stayed out all night before putting the safety of others at risk. I accept the opinion of Brian Gover, an expert witness who testified before me, that in the circumstances of this case, agreeing to a conditional sentence was unduly lenient. On the information available to Minuk, the disposition he agreed to did harm to the repute of the administration of justice. By agreeing to jointly recommend a conditional sentence, and by deciding to refrain from proving alcohol, Minuk gave up much on behalf of the people of Manitoba, without receiving anything of value in return.

The manner in which the resolution was presented by Minuk to Chief Judge Wyant was also inadequate. Manitoba law draws a clear distinction between true plea bargained sentences, and mere joint submissions on sentence. A true plea bargained sentence occurs where the accused and the Crown compromise their positions to achieve resolution – where there is a *quid pro quo* bargain – something for something. In such cases courts should not reject the plea bargained sentence unless it would bring the administration of justice into disrepute or would be contrary to the public interest. A joint submission on sentence, by contrast, occurs where the accused and the Crown, without having compromised their positions, happen to agree that a particular sentence is the appropriate one. In cases of joint submissions, the sentencing judge owes much less deference to the position of the parties. It was therefore important for Chief Judge Wyant to understand whether he was dealing with a plea bargained sentence or a mere joint position on sentence.

On August 22, 2007, the day of the sentencing hearing, Minuk not only failed to make it clear that the joint submission on sentence was plea bargained, his submissions suggested it was not a plea bargain. He said that he did not stay the charges because of Zenk's guilty plea, but because he could not prove the charges, and he said that it was his opinion that a conditional sentence was the right sentence. What was there left that he could have traded? It was not until September 12, 2007 that he told Chief Judge Wyant that he agreed to the jointly recommended sentence because of concern that he could lose the dangerous driving charge. It is little wonder that Chief Judge Wyant was confused. Minuk should have been far clearer in laying out the reasons for the resolution.

The way the alcohol factor was presented was also confusing. When the facts of the plea were entered on August 22, 2007, the phrase "anecdotal historical evidence of alcohol consumption" was offered. Chief Judge Wyant understood from this that the Crown was alleging that the dangerous driving plea was based in part on alcohol consumption by Zenk. When this was put to Minuk, he agreed. It was not until September 12, 2007, an appearance that happened only because Chief Judge Wyant was having reservations about the joint sentencing position, that it became clear that Zenk was not admitting to the consumption of alcohol.

Chief Judge Wyant asked Minuk if he was going to prove the now disputed fact. Minuk secured a recess to consider his position, called Manitoba Justice officials, Brian Kaplan, the Director of Regional Prosecutions and Education, and Don Slough, Assistant Deputy Attorney General, and after discussing the matter with them, Minuk told the Court that he would not be seeking to prove alcohol consumption. It appears from the testimony of Wolson that Minuk had already agreed as part of the resolution discussion that he would not do so. That was a deal Minuk should not have made. Minuk had ample evidence to prove alcohol consumption, as opposed to impairment. Had he proved alcohol consumption, the entire context of the death of Crystal Taman would have been before Chief Judge Wyant and he could have made his sentencing determination on the actual, provable facts instead of on pointlessly edited facts. Notwithstanding the concurrence of Kaplan and Slough, I cannot conceive that proceeding in this way was consistent with the professional standards reasonably to be expected of lawyers and agents of the Attorney General.

The way this resolution was presented to the Court highlights systemic problems that I feel the need to address. I have been advised that it is the practice in Manitoba for accused persons to enter pleas of guilty, for judges to accept those pleas and register convictions of guilty, and for the facts supporting those pleas to be read into the Court record at a subsequent appearance. This practice is wrong in law. A judge should not be accepting a guilty plea unless satisfied that it is supported by the admitted facts.

I was advised by Wolson that post-conviction disagreements over the facts between the Crown and the defence will result in guilty pleas being set aside. This is undesirable. This is a practice that prosecutors can redress. I am therefore recommending that a Ministerial Policy issue relating to the presentation of guilty pleas requiring that, at the appearance where the plea is made, prosecutors must present the presiding judge with the factual foundation for the charge, and call for a clear admission of the facts to be made by the accused.

In this case, some of the problems occurred because Minuk and Wolson were not entirely in agreement on the factual foundation for the plea. There was apparent confusion about what would be said respecting alcohol consumption, and its significance. This was a serious case, and this was a central issue. While it is not necessary to formalize factual agreements in the more mundane cases prosecutors deal with, I am recommending that a Ministerial Policy be developed that in complex or serious cases [as defined by Manitoba Justice] prosecutors shall attempt to secure in writing, the agreed statement of facts that will form the foundation for the plea.

While Madam Justice Ruth Krindle recently offered valuable advice that was accepted by the Minister on the conduct of independent prosecutors, evidence presented in this case highlighted the intensity of challenges faced by independent prosecutors in maintaining their independence from officials within Manitoba Justice. The whole point of going to independent prosecutors where a police officer is being prosecuted is to ensure that Manitoba Justice officials do not exercise control over decision-making; if they did, or even if they were to influence the outcome, it would create the appearance that prosecutorial decisions may be tainted by Manitoba Justice's interest in maintaining good relations with the police. I am satisfied in this case that Minuk made all material decisions and did not ask for approval from Manitoba Justice officials. Still, Minuk had frequent contact with Manitoba Justice lawyers, including for the purpose of getting a second opinion to ensure he was not completely off-base. I am of the view that this kind of exchange can leave the impression that Manitoba Justice officials may be exercising influence over the decisions that do get implemented. I am therefore proposing amendments to the Ministry policies adopted after the Krindle Report, to support what she was seeking to accomplish in her study. My recommendations will reaffirm the importance of independent prosecutors keeping the Attorney General advised of important decisions that are being taken, while refraining from consulting on those decisions. My recommendations, if accepted, would make clear that independent prosecutors can secure advice on the implementation of decisions, and on their consistency with Ministry Policies, but provides that where that advice does cause a change of position by the independent prosecutor, this should be made transparent. I also call for the establishment of a standing group of experienced criminal lawyers independent of Manitoba Justice, with whom independent prosecutors can consult. Independent prosecutors do not have the benefit that line Crowns do for case conferencing and informal consultation, and this recommendation would provide that opportunity without raising appearance of independence issues.

The Victims' Bill of Rights

The last part of my mandate was to inquire into whether the services provided to the family of Crystal Taman were sufficient having regard to the requirements of *The Victims' Bill of Rights*. That statute imposes informational obligations on the law enforcement agency investigating the charge, and both informational and consultative obligations on the Manitoba Department of Justice prosecutors. Many of the informational obligations designed to be discharged by Department of Justice prosecutors have been assigned within Manitoba Justice to Victims Services.

I heard evidence of a number of complaints relating to the victim services provided both to Crystal Taman's husband and children and to her parents, Sveinn and Victoria Sveinson.

The Definition of Victim

Technically, only Robert Taman, Crystal's husband qualifies as a victim under the statute. The statute was evidently drafted in the expectation that information learned by the designated victim would be shared with other family members. As a matter of law, the Sveinsons had no rights under *The Victims' Bill of Rights*, nor did Crystal's children. This case demonstrated the problems with such a regime. Family dynamics were such that having the husband of the deceased as the only designated victim did not serve to keep all family members apprised of what was happening. To their credit, both the provincial Victim Services program workers and Minuk went beyond their statutory obligations and provided information to the Sveinsons. Indeed, Minuk met with them on three occasions and fielded their phone calls. I am persuaded that this kind of contact with parents and children of a deceased crime victim by Manitoba Justice officials is so important that it should not be left to chance. I am therefore recommending that the Minister of Justice take steps to promote an amendment to *The Victims' Bill of Rights* that would enable parents and children of a deceased victim to enjoy the informational rights provided for in the bill, where the parents or children request access to those benefits on the basis that the designated victim may be unable or unwilling to disseminate the information.

East St. Paul Police's Compliance

In this case, East St. Paul Police Service was the law enforcement agency that carried the informational obligations. It was their investigation. There was contact between East St. Paul Police Service and the Tamans, and even with the Sviensons. Most notably, Pedersen, the Victim Liaison Officer, accompanied by a young volunteer, made a visit to the Tamans on the day of the collision. A few days later, both Bakema and Carter met with the family. In spite of these initiatives I find that the East St. Paul Police Service failed to discharge its obligations owed under *The Victims' Bill of Rights*. Robert Taman was never given an application to register as a victim; was never advised of the rights and remedies under the statute; and he was not given information required by the statute, including the services available him or of his right to obtain information. These are all things required by the statute. It is not just that these informational obligations were overlooked. While those who dealt with the family were truly touched by their tragedy, the way in which the family was dealt with was insensitive. When the family was still in shock, Pedersen visited them with a young, untrained volunteer, and left pamphlets on grieving that contained distressing information. The timing of that visit was bad. When the family sought information from Pedersen, she told them she did not know, rather than explaining that she could not share what she knew. This created the impression of an uninformed police service. For their part Bakema and Carter inappropriately assured the family that the alcohol case against Zenk was strong, creating false expectations, yet failed to provide details that could have been shared. As a result, the Tamans were left to rely on rumour and unofficial sources at a time when they craved information.

Victim Service Workers' Compliance

By contrast, the Victim Services program workers, Leslie McCorrister and Monica Dyck, conducted themselves with professionalism. Aside from periodic glitches in communication because of the failure to accurately record changed contact information, they provided useful and timely information about court appearances, and good advice on how to navigate the system. They initiated contact and responded in a timely and meaningful way to requests for contact, and they acted as liaison between the family and Minuk. They attended meetings and court appearances when they could. The family found them to be caring and compassionate. The only real criticism Robert Taman had of the Victim Services workers was that they acted as an extension of the Crown's office. His impression is not surprising. Victim Services program workers in fact perform statutory functions on behalf of the Crown.

During their testimony, both the Tamans and Sviensons spoke of how difficult it was for them to complete their Victim Impact Statements, notwithstanding the literature shared with them by the Victim Services workers. Those problems exist not only because preparing a Victim Impact Statement is an unfamiliar and emotional task, there are also significant restrictions on what can be included in Victim Impact Statements. That can be perplexing for a victim. I would therefore recommend that measures should be put in place to have Victim Services workers offer victims personal assistance in preparing the statements.

Minuk's Compliance

Most of the important obligations imposed under *The Victims' Bill of Rights* fell to Minuk. Commendably, Minuk spent more time meeting with Robert Taman than most prosecutors spend with designated victims in similar cases. In spite of this, Minuk failed to fulfil his obligations under the statute. First, the statute requires the prosecutor to consult with the designated victims on resolution agreements and staying charges. Leaving aside for the moment the question of what consultation entails, Minuk did not communicate effectively, nor share key material information with Robert Taman. At no point did he advise Robert that resolution discussions were underway, and it was not until the morning the plea to dangerous driving was entered, July 17, 2007, that Minuk advised Robert that this was going to happen.

It was not until August 22, 2007, the day sentencing submissions were made, that the Tamans learned that Minuk was going to be participating in a joint recommendation for a conditional sentence. And it was not until September 12 that the Tamans learned that Minuk had plea bargained the case and that he was not going to be relying on Zenk's alcohol consumption during the sentencing. These were crucial decisions, and it was wrong for Minuk to fail to prepare the Tamans for what was coming.

Most disturbingly, Minuk misled not only the Tamans, but also the Sveinsons on a number of points. At the very first meeting, when pressured by Robert Taman about why he met with the Sveinsons when he, Robert, was the designated victim, Minuk told Robert Taman that he had met with the Sveinsons on a matter unrelated to the charge. This was inaccurate. Minuk had in fact discussed the prosecution of Zenk with the

Sveinsons. Then Minuk led the Tamans and the Sveinsons to believe that the first scheduled preliminary inquiry was being adjourned to enable further investigation of the charges against Zenk and that this was in the interests of the prosecution. In fact that adjournment was to enable a related but separate investigation to be conducted into whether Bakema should be charged with obstruction of justice.

The family was led to believe that the painful delay was serving the family's interests when it had nothing to do with them. Then after deciding to stay three of the four charges, Minuk told the Sviensons and the Tamans that the dangerous driving charge he was proceeding on was the most serious one, when it was not. And then Minuk denied, when confronted by the Tamans and the Sveinsons, that he had not plea bargained the case, even though he had. Perhaps most distressing of all, he led Wolson and Chief Judge Wyant to believe that the Taman family was on side with the resolution being proposed when it was clear that they were adamantly opposed to the kind of disposition that Minuk was endorsing. Instead of being up front and dealing with the anticipated difficulties the truth would present him in his dealings with the family, Minuk chose time and again to spin reality. It is implicit in the information obligations of *The Victims' Bill of Rights* that a prosecutor must provide accurate information. Minuk did not do so.

Systemic Issues

As the evidence unfolded, it became clear that there is a systemic problem with *The Victims' Bill of Rights*. Both experienced prosecutors and Victim Services workers who appeared before me expressed concern that the promises in the statute that prosecutors will "consult" with victims on key prosecutorial decisions create false impressions. The term "consult" suggests that prosecutorial decisions will be made along with victims when, in fact, prosecutors are duty bound to make decisions as ministers of justice, and in the interests of the public at large. The most that can be promised is that prosecutors will listen to and seriously consider the views of victims. I am therefore recommending that the statute be amended to adopt this or similar language in place of the false promise of consultation.

The Taman tragedy has also made it apparent that independent prosecutors should receive intense and dedicated training in the ethics and requirements of *The Victims' Bill of Rights*. They toil outside of the victim-sensitive culture that line Crown's work in, and may not develop the sense of priority that they should have. While independent prosecutors receive some literature and policy documents, they are left to learn "on the job" and from their own initiative. This proved inadequate in the Taman case, and it is an unreliable strategy. I am therefore recommending that the Minister take steps to ensure that independent prosecutors be provided with training in the requirements and ethics of *The Victims' Bill of Rights*, and that they be required to attend any training sessions that may be offered to line Crowns dealing with victims services.

This Inquiry also learned that independent prosecutors do not have ready access to the Crown/Victim Services computerized information system, called PRISM. This can result in confusion. To take but one example from this case, Victim Services worker McCorrister was under the mistaken impression that Minuk had met with Robert Taman. Had Minuk been linked to PRISM, thereby recording his victim contacts, this mistake would not have occurred. I am therefore recommending that the Minister examine whether there are means to furnish independent prosecutors with complete access to the PRISM system, and if so, to make it available.

What follows is my Report, in which I arrive at the conclusions summarized in this synopsis.

TAMAN INQUIRY
INTO THE INVESTIGATION AND PROSECUTION OF DEREK HARVEY-ZENK

INTRODUCTION

On February 25, 2005, Crystal Taman, a 40-year-old dental assistant, as was her custom, left her home before 7:00 a.m. for work, driving her 1991 yellow Chevrolet Sprint convertible. To get to work, she took Provincial Trunk Highway 59 south. Highway 59 is divided by a median with two lanes in each direction. As Highway 59 approaches Highway 101 (known as the Perimeter Highway) from the north, it adds a third westbound (or right hand) turn lane. There are stop lights at the intersection of Highway 59 and Highway 101. There is a turning signal at the intersection to enable drivers of vehicles travelling north on Highway 59 to cut across the southbound lanes so that they can turn west on Highway 101. On the day of the accident, there were two traffic signs approximately 250 metres north of the intersection. One of the signs, a diamond shaped, yellow advisory sign with the symbol of a traffic light was installed in the median adjacent to the left lane. Two alternating flashing amber lights were attached to the sign post and visible on the left and right sides of the post. These alert southbound drivers on Highway 59 of the traffic signals at the intersection. Approximately 112 metres north of the intersection was a posted 80 kilometres per hour sign. The temperature was minus 20 Celcius, and the weather and the road conditions were clear.

Crystal Taman had stopped her motor vehicle at the intersection of Highways 59 and 101 for the red light. She was stopped in the left-hand southbound lane, adjacent to the median. In front of her vehicle was a dark-green Hyundai operated by its lone occupant, Kathleen Beattie (Beattie). The light had just turned green when a 1995 Dodge Dakota pickup truck, owned and driven by Derek Harvey-Zenk, an off-duty police officer of the Winnipeg Police Service, struck the rear of her vehicle propelling it into the Beattie vehicle. Crystal Taman suffered severe injuries from the collision resulting in her death.

The accident occurred within the jurisdiction of the East St. Paul Police Department (ESPPD) and was investigated by that police department. On March 5, 2005, the ESPPD charged Derek Harvey-Zenk (Zenk) with four offences under the Criminal Code: dangerous driving causing death, contrary to section 249(4); impaired driving causing death, contrary to section 255(3); refusing to provide a breathalyzer sample, contrary to section 254(5); and criminal negligence causing death contrary to section 220(b).

Martin Minuk (Minuk), a member of the Bar of Manitoba, was assigned by Manitoba Department of Justice as an independent prosecutor to prosecute the charges against Derek Harvey-Zenk. Richard Wolson (Wolson) was retained by Zenk to defend him.

On July 17, 2007, Zenk was arraigned on the charge of dangerous driving causing death before Chief Judge Wyant of the Manitoba Provincial Court and pleaded guilty. After the plea of guilty was entered, Minuk entered a stay of proceedings of the three remaining charges. At the request of counsel, the case was adjourned to August 22, 2007 for submissions on the appropriate sentence. On August 22, 2007, Minuk and Wolson made a joint submission for a conditional sentence of two years less a day, without conditions. After hearing submissions, Chief Judge Wyant adjourned the case to September 5, 2007, to consider the submissions made by Minuk and Wolson.

On August 31, 2007, Chief Judge Wyant wrote to Minuk and Wolson indicating that he was contemplating rejecting the plea bargain and inviting further submissions. The date of September 12, 2007, was set for the new hearing. On the return date, Chief Judge Wyant asked Minuk whether he intended to call evidence to prove alcohol consumption by Zenk. Minuk asked for a short adjournment. Upon the resumption of the proceedings, Minuk advised Chief Judge Wyant that he did not intend to call evidence to prove alcohol consumption by Zenk. Chief Judge Wyant then adjourned the case to October 29, 2007, to consider the submissions made by counsel. On October 29, 2007, Chief Judge Wyant delivered reasons for sentence in which he accepted the joint submissions for a conditional sentence of imprisonment of two years less a day, without conditions. However, Chief Judge Wyant made a number of critical comments about the process that had taken place.

The family of Robert Taman and Crystal Taman's parents, Sveinn and Victoria Sveinson, expressed their concern to the Minister of Justice and to the media that the proceedings had resulted in a plea of guilty to only one of the four charges and that a conditional sentence was agreed upon by the Crown and the defence. As a result, the Minister of Justice ordered a public inquiry. On December 5, 2007, the Lieutenant-Governor signed the Order-in-Council appointing the Honourable Roger Salhany, Q.C. as Commissioner to conduct the inquiry and report on his findings.

1. The Order-in-Council

Order-in-Council #403/2007, dated December 5, 2007, (See Appendix A) authorized the Commissioner as follows:

(a) To inquire into the conduct of the police investigations surrounding the death of Crystal Taman on February 25, 2005, including, but not limited to:
   (i) the correctness and adequacy of the procedures and practices that were followed
   (ii) the good faith, objectiveness and professional standards with which the procedures and practices were applied and decisions made

(b) To inquire into whether all aspects of the prosecution of Derek Harvey-Zenk, including the Crown's position on sentence, were conducted in accordance with the professional and ethical standards expected of lawyers and agents of the Attorney General.

(c) To inquire into whether the services provided to the family of Crystal Taman were sufficient having regard to the requirements of *The Victims' Bill of Rights*.

(d) To give advice on whether findings on any of the above matters gives rise to a need for further study, review or investigation and, if so, by whom.

In preparing this report, I reminded myself of paragraph 3 of the Order-in-Council which provides as follows:

In keeping with the principles summarized by the Supreme Court of Canada in *Canada (Attorney General v. Canada (Commissioner of the Inquiry on the Blood System)*, the Commissioner must perform his duties without expressing any conclusion or recommendation about the civil or criminal liability of any person or organization.

2. The Appointment of Commission Counsel

I appointed Mr. David Paciocco as Counsel to the Commission and Vincent Clifford as Associate Commission Counsel

3. Counsel Granted Standing

The following parties were granted standing at this Inquiry:

Robert Taman, represented by Gene Zazelenchuk and Ian Restall, full standing

Martin Minuk represented by Michael T. Green and Karen Dixon, full standing

Derek Harvey-Zenk, represented by Jay Prober and Bradley King, standing for investigation and prosecution issues

Winnipeg Police Service, represented by Shannon Hanlin and Michael Jack, standing for investigation and prosecution issues

Winnipeg Police Association, represented by Keith Labossiere, Scott Hoeppner, Stephanie Messner and Karen Clearwater, standing for investigation and prosecution issues

Rural Municipality of East St. Paul and its Police Service (the East St. Paul Police Service) represented by R.D. (Bob) McDonald and Bernice Bowley, full standing

Harry Bakema, represented by Hymie Weinstein, Q.C. and Lisa Labossiere, standing for investigation and prosecution issues

Government of Manitoba, represented by Glenn McFetridge, Sean Boyd and Stanley Nozick, full standing

The Manitoba Bar Association was granted full standing, but withdrew participation on March 7, 2008.

4. The Proceedings

The Inquiry proceeded in two phases. Phase 1 focused on the third authorization in the Order-in-Council. It dealt with the experiences of the Taman family with the Manitoba Department of Justice system, namely, "whether the services provided to the family of Crystal Taman were sufficient having regard to the requirements of *The Victims' Bill of*

Rights." During this first phase, Commission counsel called as witnesses, family members of Crystal Taman, expert witnesses to describe the nature and operation of Victims' Services within the province, and justice officials who dealt directly with family members during the 2½ years that it took for the prosecution of Zenk.

Phase 2 focused on "the conduct of the police investigations surrounding the death of Crystal Taman, including but not limited to the correctness and adequacy of the procedures and practices that were followed, and the good faith, objectiveness and professional standards with which the procedures and practices were applied and decisions made." It also focused on "whether all aspects of the prosecution of Harvey-Zenk, including the Crown's position on sentence, were conducted in accordance with the professional and ethical standards expected of lawyers and agents of the Attorney General."

The second phase heard witnesses who were at the accident scene, including paramedics and investigators from the East St. Paul Police Department. It also included police officers from the Winnipeg Police Service (WPS) Professional Standards Unit (PSU) who investigated Zenk's activities in the hours leading up to the accident and some of those Winnipeg Police Service officers who were with him the evening before the accident. Also heard as witnesses were lawyers involved in the prosecution and defence of Zenk and Zenk, himself. Expert evidence on standards of investigation and on the ethical and professional standards for prosecutors was also heard.

Fifty witnesses were called to testify during both phases of the Inquiry. (See Appendix A) In addition, 251 exhibits were filed (See Appendix B).

This report has been divided into four parts. It begins with the investigation conducted by the East St. Paul Police Department and ends with the sufficiency of the services provided by the East St. Paul Police Department and the prosecution services to the Taman family.

A. THE INVESTIGATION BY THE EAST ST. PAUL POLICE DEPARTMENT
B. THE INVESTIGATION BY THE PROFESSIONAL STANDARDS UNIT
C. THE PROSECUTION OF DEREK HARVEY-ZENK
D. COMPLIANCE WITH THE MANITOBA *VICTIMS' BILL OF RIGHTS*

PART A
THE INVESTIGATION BY THE EAST PAUL POLICE DEPARTMENT

1. The investigation conducted by the Royal Canadian Mounted Police (RCMP) of the accident scene

Constable (Cst.) Christopher Blandford, a Forensic Collision Reconstructionist with the Royal Canadian Mounted Police, conducted an analysis of the accident scene on behalf of East St. Paul Police Department. His report was entered as Exhibit 60 in these proceedings. The following is a summary of the significant conclusions in his report.

All three motor vehicles involved in the accident were southbound in the left lane of Highway 59. The motor vehicle driven by Crystal Taman and the motor vehicle driven by Beattie were stopped at a red traffic light at the intersection of Highway 59, south, and Provincial Trunk Highway 101, west, with the Beattie vehicle stopped in front of the Taman vehicle. The brake lamps were activated on both sides of the Taman vehicle and the driver's side clearance lamp and passenger's side tail lamp were on at the time of the collision. Both tail lamps and at least one of the brake lamps were activated on the Beattie vehicle. The Taman vehicle was stopped directly behind the Beattie vehicle. While these vehicles were waiting for the red traffic light to change, the motor vehicle driven by Zenk collided with the rear of the Taman vehicle. There was no evidence to show that the Zenk vehicle attempted to avoid the collision by steering or braking. The force of the collision crushed the rear third of the Taman vehicle, eliminating approximately 1.36 metres to 1.42 metres of its length, and causing the frame and floor pan to buckle downward and make contact with the road. When the Taman vehicle collided with the rear of the Beattie vehicle, the Zenk vehicle was still connected to the rear of the Taman vehicle.

Following the collision, the Taman vehicle continued directly south, while rotating counterclockwise a minimum of 90 degrees to its final resting position in the centre of Highway 59, south of the intersection. The entire front end of the Taman vehicle collided with the rear of the Beattie vehicle. The force of the collision propelled the Beattie vehicle in the direction of a street light standard in the southwest corner of the intersection, where it came to rest within one metre of striking the light standard. After the collision, the Zenk vehicle changed direction slightly, proceeding in a southeasterly direction. When it was approximately in the middle of the intersection, Zenk aggressively applied the brakes skidding across the intersection and on to the snow built up in the median ditch on the south side of the intersection. Once on top of the snow, the truck continued towards the south.

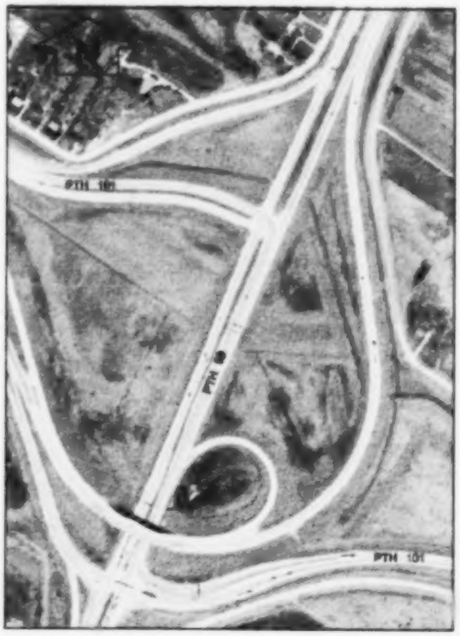
The driver's side rear corner of Zenk's vehicle sideswiped the traffic light standard in the median, causing minor contact damage to the fender and tail light assembly. Eventually, the Zenk vehicle left the median and returned to the highway. Once back on the southbound lane of Highway 59, Zenk accelerated his truck causing the rear wheels to spin on the snow-covered east shoulder. This caused the rear end of the truck to swing out toward the right, heading back toward the median. The truck was then driven back onto the median in a southeasterly direction. Approximately two metres to the east, Zenk steered his truck sharply toward the south and came to rest in the median ditch, facing south.

All traffic lights were functioning properly. Immediately prior to the collisions, the traffic lights changed from red to green. It is known that the advance lights are activated 11 seconds prior to the commencement of the yellow light cycle for southbound motorists. The yellow-to-red light stage is four seconds in duration. Therefore, a southbound motorist has a minimum of 15 seconds, warning before the lights change to red. If a vehicle is travelling a speed limit of 80 kilometres per hour the beginning of this 15-second period, the vehicle would be approximately 333.60 metres north of the intersection. This would place that vehicle well north of the advance warning lights, which were just less than 250 metres north of the intersection. Based on the survey conducted of the shortest, longest and average length of time the red light is on at the intersection for southbound traffic, motorists could conceivably be approximately 384.75 metres, 680.54 metres or 1,000.80 metres north of the intersection when the traffic lights for southbound traffic changed to red.

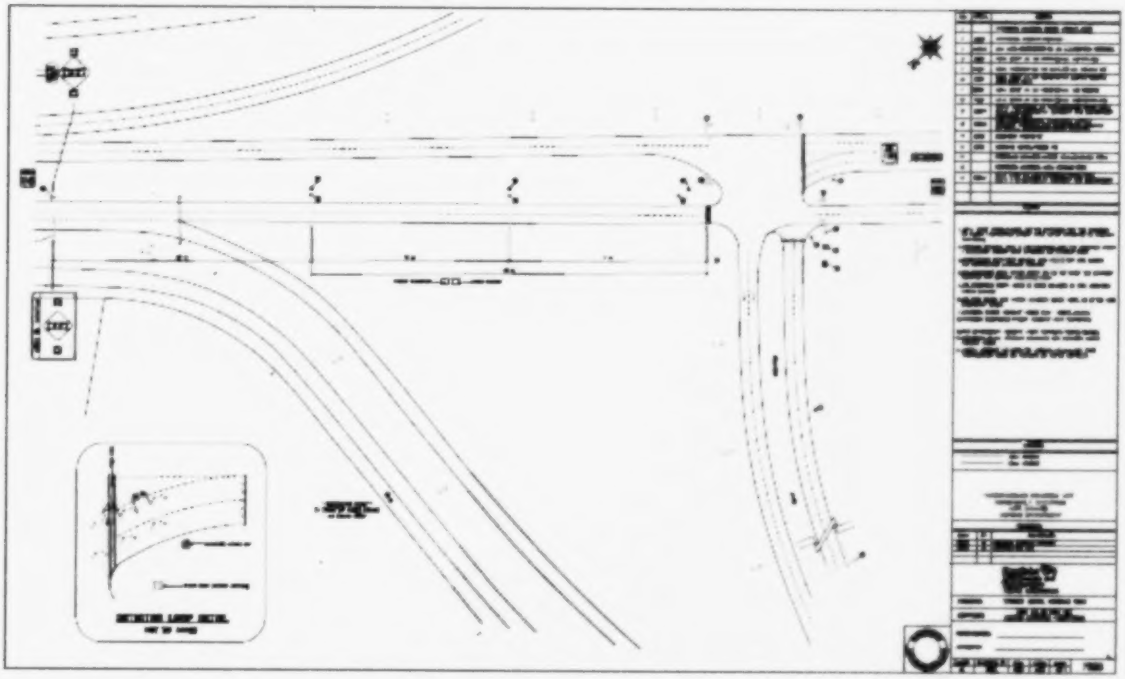
In addition, these distances do not take into consideration the timing of the advance warning lights and the yellow light cycle of 15 seconds. In this case, the Zenk vehicle would have been further away from the intersection. This distance could be longer, because information gathered by the investigators determined that Beattie saw the yellow light come on. She slowed down and stopped for the red light. The red light lasted an indeterminate amount of time and then changed to green. Beattie was about to move when the collision occurred.

If this information is accurate, then Zenk was presented with the activated advance warning lights and the cycling of the traffic lights, from green to yellow to red, and finally back to green, prior to the collisions. If this part of the investigation is based on the shortest time the red light could have been on, Zenk was a minimum of 135.29 metres north of the advance warning lights when the red lights activated. At the speed limit, it would have taken Zenk 6.03 seconds to cover this distance. If the time of the advance warning lights and yellow-to-red light stage is factored into this particular situation, Zenk would have been a minimum of 467.70 metres north of the advance warning lights when they activated. A vehicle equipment defect or failure was not a contributory factor. There was no evidence found to support any attempt by Zenk to avoid the collision.

2. Diagrams of the accident scene

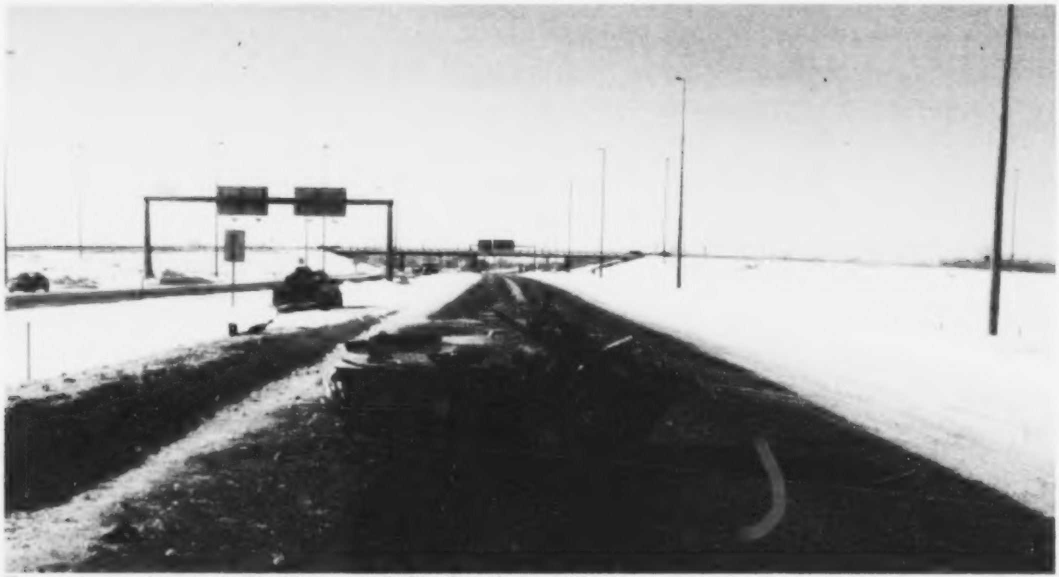

PTH 101
PTH 59
PTH 101

Arial photo of intersection of Highways 59 and 101
Exhibit 66 (p. 162 of Disclosure B-1)

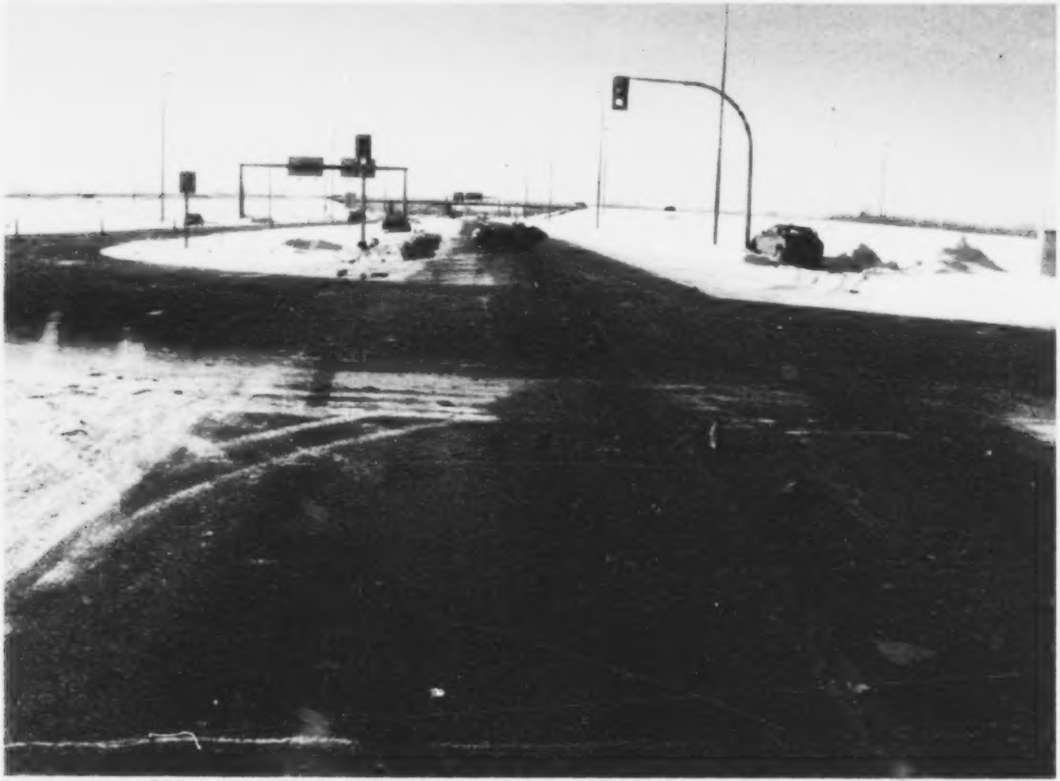


Intersection of Highway 59 and Highway 101
Exhibit 67 (p. 163)

3. Photographs of the accident scene



Taman's car (centre); Zenk's truck (left) after the accident
(Exhibit 62 p.112)



Intersection of Highways 59 and 101 after the accident. Zenk's truck (left), Taman's car (centre), Beattie's car (right)
(Exhibit 62 pp.124)

4. The evidence of Kathleen Beattie regarding her observations at the accident scene

Kathleen Beattie (Beattie) travelled Highway 59 to work every morning, from Monday to Friday. On Friday morning, February 25, 2005, she had left for work at 6:30 a.m. proceeding southbound on Highway 59 in the passing lane and had stopped at the intersection of Highway 59 and Highway 101 for a red light. The 1991 yellow Chevrolet Sprint automobile driven by Crystal Taman stopped directly behind her. When the light turned green, Beattie was in the process of taking her foot off the brake when she heard a loud crash behind her. As she turned to look behind her, her vehicle was struck by the Taman vehicle. It propelled Beattie forward across the intersection in the direction of a light standard on the right-hand side of the highway. She put on her brakes and was able to crank her wheel to the right and avoid collision with the light standard. She came to a stop on the right-hand side of Highway 59, facing south. The yellow Chevrolet was stopped a short distance in front of her vehicle, in the middle of the southbound lane of Highway 59. A blue Dodge Dakota truck was stopped ahead of the Taman vehicle on the left side of Highway 59, on top of the snow embankment.

Beattie remembered immediately getting out of her car and looking for her cell phone. While she was out of her car, a man walked in her direction across Highway 59 from the Dodge truck. As he walked in her direction, he paused for a few seconds at the Taman vehicle and then continued in her direction. When he was about four feet away, he stopped and stood straight in front of her and looked at her face-to-face. She thought that it was odd that he was just staring at her and did not say anything. She asked him if he saw who had had hit her. He did not answer and kept looking at her. He then turned and walked away towards his truck and stood by his truck.

She said that she could detect no odour of alcohol on his breath when he stood four feet in front of her. An ambulance arrived and she was then put in the front passenger seat of the ambulance, which was facing south. While she was sitting in the ambulance, she noticed what she believed to be more than one police officer with the driver of the truck. They were standing in front of the truck having a conversation with the driver of the truck.

She said: "It looked like they were standing talking." She could not hear what they were saying but "it looked like conversation was happening." She could not say how many officers there were. She also noticed that fire department personnel were by the Taman vehicle, attending to Crystal Taman. About 15 or 20 minutes after Beattie was put in the ambulance, she was taken to the Concordia Hospital and later released.

Beattie was interviewed by Harry Bakema (Bakema) the Chief of the East St. Paul Police Department (ESPPD) the following day at her residence. She gave a Traffic Accident Report (TAR), which he wrote down in his handwriting and she signed it. No one from the ESPPD followed up to take a more formal statement. On May 31, 2006, she was interviewed by the RCMP and gave a more formal statement. Her understanding was that the interview by the RCMP was for the purposes of an update or insight into her observations, before going to court. She understood that the case was going to court later that year.

5. The evidence of Garth Shaw regarding his observations at the accident scene

Garth Shaw is the manager of a collision repair shop. He is 43 years old and has been involved in the repair of motor vehicles since he was 16. On February 25, 2005, he had left for work at 6:30 a.m. driving his Uplander van and was also proceeding southbound on Highway 59, behind the Beattie and Taman vehicles. He said that north of the intersection of Highways 59 and 101, Highway 59 is a flat, straight road for a distance of one to two kilometres leading up to the intersection. A motorist travelling south on Highway 59 would have a clear view of the intersection and would see the yellow caution lights and the red and green lights at the intersection.

As he approached the intersection, Shaw noticed two vehicles near or at the intersection at a red light. As he got close to the flashing yellow caution lights, he decided to pull into the right (or driving) lane to stop at the intersection. Just as he passed the yellow caution lights and had turned into the right driving lane, he saw a blue Dodge truck, in his words, "shoo" right past him in the passing lane. As he said: "he was gone by, like, in a flash." Shaw told the RCMP in his interview with them that: "He just blew by me like there was no tomorrow." Shaw estimated the speed of the truck at twice what he was doing, and he was doing 40 to 50 kilometres an hour. As the truck passed him, Shaw said he thought to himself, "He is not going to stop."

Shaw said he knew that the truck did not have enough room to stop at that speed in that short distance. The truck was going straight ahead and did not stop. He said that he believed that the light at the intersection was still red, although it had more likely just turned green, when the truck struck the yellow Chevrolet Sprint causing it to collide with the green vehicle in front of it. Shaw was 10 car lengths behind the truck at the time of the impact. He said that the impact forced the green (Beattie) vehicle into the right driving lane. The blue truck then clipped the light standard on the left side of Highway 59, forcing the truck back onto the road. The truck then ended up back on a snow bank on the southeast corner, past the intersection, 10 to 12 car lengths away. Shaw said that the time of the accident was 7:07 a.m. based on the time on his cell phone records, which indicated the time that he called 911 to report the accident.

Shaw said that the road was dry and a little slick at the intersection. After stopping at the intersection, he moved his vehicle into the southbound end of the intersection, behind the Taman vehicle, to protect it from other cars. He then saw the driver of the truck get out of the driver's side of his vehicle and walk over to the Taman vehicle. He described the driver as around six feet, 190 pounds, in his 30s and with a short hair style. The driver stood and stared at the Taman vehicle for about 15 to 30 seconds and then walked back to his truck. He noticed that the driver's nose was bleeding. There did not appear to be any sense of urgency to his walk. It was slow and deliberate, as if he was in a state of shock. Shaw was about five to 10 feet away from the driver of the truck when he made the observations. The driver returned to his truck and stood leaning on the passenger side fender/door area.

Shaw said that the first person to arrive at the scene was an off-duty Winnipeg firefighter (whom he later recognized as Dale Kasper) and then the firefighters who went over to look at the yellow vehicle. The next to arrive, within five to 10 minutes, were the paramedics who also went over to the yellow car. Shaw got into his vehicle and moved it to the northeast corner of the intersection into the passing lane. A police cruiser with two officers arrived from behind Shaw, 10 minutes after the accident. One of the officers went over to the truck and spoke with the driver. They seemed to be having a conversation (he saw their mouths move) which lasted about five minutes. The police officer then escorted the driver in his direction. The driver was in front of the officer, but there was no contact between them. The driver was "standing up normally" and walked at a normal pace. The officer and driver were about three feet away from his vehicle as they passed by the passenger side.

While Shaw was sitting in his van, a police officer approached him and got into his van and asked about his health. The officer told him that he would have to provide a statement and that someone would be around that evening. The officer who had been speaking to the truck driver then came over and said that someone would be over to his place later to take his statement. He did not know who it was at the time, but was able to identify that officer as Bakema from a photograph he subsequently saw of him. Shaw left the scene at around 11:00 a.m. and was later interviewed at 10:05 p.m. that evening by Cst. Jason Woychuk (Woychuk) and gave his statement.

6. The evidence of Tara Taman regarding her observations at the accident scene

Tara Taman and her sister, Kristin Taman, set out for work shortly after their mother, Crystal Taman, following the same route. When they saw that the traffic on Highway 59 was backed up, they turned and went down a side road to come out on the other side of Highway 101. Concerned about their mother, they called her on her cell phone. When they received no answer, they were worried that she might have been in an accident and turned back just to make sure. Arriving at the accident scene, they saw their mother's car. They stopped their car and ran up to the accident site. They were stopped by Cst. Ken Graham (Graham) who inquired whether they were running to the green (Beattie) car. When they said "no," he took them back to his cruiser that was parked in the passing lane on the north side of the intersection at the point of the collision. On the way to the cruiser, Tara called her father on her cell phone to tell him what had happened. Graham took the cell phone from her and spoke to her father. He then told Tara and Kristin to get into the back of the cruiser and to wait for their father. They sat in the back of the cruiser facing in the direction of the Dodge truck, while Graham got in the front.

While sitting in the cruiser, Tara said that she saw two police officers with the driver standing at the truck speaking to him for about two to three minutes. The two officers seemed to be helping the truck driver out of the truck, but she was not sure. The three started to walk in her direction, with an officer on each side, one holding the driver by the elbow. The driver did not seem to have any trouble walking. She said that she turned to speak to Graham and, when she looked up, she saw the driver of the truck standing in front of the their cruiser leaning on the passenger side headlight speaking to one of the officers who had led him up to the cruiser. The conversation lasted for 10 to15 minutes. That officer then got into the front of the cruiser and spoke to Graham. Tara's father then arrived and told Graham to let them out of the cruiser. Graham did and they proceeded to the Concordia Hospital to see their mother. No member of the ESPPD ever contacted Tara to give a statement.

7. The evidence of Denise Bukowski regarding her observations at the accident scene

Denise Bukowski (Bukowski) works at the Concordia Hospital as the director of volunteers and has worked there for 11 years. On the morning of the accident, she and her husband, Alan, were also driving southbound on Highway 59 on their way to work. Her husband was driving their motor vehicle. Shortly after 7:00 a.m., they were about a quarter of a mile away from the intersection of Highway 101, in the right driving lane when she noticed that the light was green and traffic was not moving. She then noticed that there had been an accident and asked her husband to pull over to the right shoulder of the road. Bukowski said that her husband pulled their vehicle over to the right shoulder, almost at the intersection. While her husband grabbed the cell phone and tried to call 911, she got out of her vehicle and ran to the green (Beattie) vehicle which was on the right shoulder, 20 feet past the middle of the intersection. She found Beattie looking in her purse for her cell phone, asked her if she was okay and was told that she was. Bukowski also asked if there was anyone else in her vehicle and was told that there was no one else. Beattie pointed in the direction of the Taman vehicle and told Bukowski that there was no one moving in the vehicle. Bukowski then went over to the Taman vehicle, which was in the centre of the road, looked in and realized that there was nothing that she could do.

Bukowski said that she then noticed a man about 20 feet away come around from the driver's side of the truck and walk in the direction of the Taman vehicle. She said that he was walking towards her very slowly. She moved towards him to intercept him so that he would not see what she had seen in the Taman vehicle. She said that she did not get the impression that he was coming to help because he seemed calm and was walking towards her very slowly. She described him as five feet, 10 inches, clean-cut with short hair and 35 to 40 years of age. She stopped him 10 or 15 feet from the Taman vehicle and asked him if he was okay. He did not answer. She noticed that he had a flat aspect: "No expressions whatsoever, just kind of stared at me." She asked him if there was anyone with him, and again, he did not respond. She felt that he looked fine and unhurt. She did not detect the odour of alcohol. She then told him that he didn't need to go to the Taman vehicle and he turned around and went back to his truck.

Bukowski returned to the Taman vehicle and saw a paramedic who works for the Winnipeg Fire Service looking inside the vehicle and had a short conversation with him. She then left to go to work, arriving at her workplace around 7:45 a.m. Later, she heard on the radio that the police were looking for witnesses to the accident. She called the ESPPD and was interviewed by Bakema on March 7, 2005. She gave him a statement and drew him a diagram of the scene.

8. The evidence of Edward Rosser and Rolland Fontaine regarding their observations at the accident scene

Edward Rosser (Rosser) and Rolland Fontaine (Fontaine) are both experienced certified paramedics who were dispatched to the scene of the accident on February 25, 2005 in case anyone needed medical assistance. At the time of the accident, Rosser had 12 years experience, while Fontaine had 19 years experience. Both were employed by the Selkirk Ambulance Service and had attended thousands of accidents during their long careers, including many fatal accidents and cases involving alcohol. Rosser and Fontaine had worked together as partners for many years.

The call for paramedic assistance was received by Selkirk on at 7:17 a.m., they departed on route at 7:20 a.m. and arrived at the scene at 7:38 a.m. Upon arrival, they were directed by the Winnipeg medical supervisor to check out the truck driver (Zenk) who had been placed in the back seat of a SUV police cruiser. Fontaine opened the passenger door, leaned in and saw Zenk sitting with his hands between his knees looking straight ahead. There was no eye contact. He noticed immediately the odour of liquor inside the police cruiser and asked Zenk if he wanted to see a doctor in the emergency room. Zenk, looking straight ahead, said: "No". Fontaine said that he had his head in the cruiser a minute or less. When Zenk refused treatment, he closed the door to the cruiser and went up to Zenk's truck to examine it for any cause of injury, such as a steering wheel or windshield. He looked inside and found nothing unusual. He then went to the Beattie vehicle to see if Beattie needed medical treatment.

Rosser opened the driver's side of the SUV cruiser as soon as Fontaine closed the passenger door, got in the vehicle and sat down beside Zenk. His purpose was to do a patient assessment to see if Zenk needed medical help. This included an assessment to see whether Zenk was capable of competently making a decision about his own health. When he first got in the cruiser, Zenk was shaking, was quiet and looked straight ahead. Rosser asked Zenk some standard questions. He said that Zenk was very quiet in answering his questions and gave very short answers. There were some questions he did not answer. He said that Zenk looked pretty worried and seemed very careful about what he was saying and what he was answering. Zenk responded to questions about the date, time and place. Rosser found him to be alert and oriented in his answers to those questions.

Rosser said that he could smell liquor on Zenk's breath which was not strong but noticeable. He asked Zenk if he had been drinking and Zenk did not respond. He noticed blood coming from Zenk's nose. Zenk complained of pain to his left leg in the back of the calf. Rosser looked at Zenk's leg and noticed a little burn on his shin. Zenk said that he did not wish to go to the hospital. Rosser concluded that Zenk was not in shock. It was his experience that a person in shock is pale, sweaty, the heart is racing and the blood pressure is low. He observed no signs of concussion. Rosser completed his assessment in 15 minutes and asked Zenk to sign the form, which he did.

After Rosser conducted his assessment of Zenk, Fontaine and Rosser left the accident scene at 7:56 a.m. Fontaine said that Carter contacted him by telephone and asked him for a statement of his recollections from the accident scene. He prepared a statement in his own handwriting on March 29, 2005 and dropped it off at the ESPPD. In that statement, he wrote: "This patient seemed very depressed on scene and both Ted and myself felt alcohol consumption was a factor in this collision." He was never contacted by the special prosecutor and never called to go to court.

Rosser was interviewed by Bakema on March 24 and gave a statement. The interview lasted 15 minutes. In his interview, he said: "I noticed a smell of alcohol coming from him and asked him if he had been drinking that night or this morning. He didn't respond to the question…" Rosser was never contacted by the special prosecutor. Although he received a subpoena for the trial that was to take place in 2007, he later received a telephone call and was told he did not have to go to court.

9. Note-making practices of the East St. Paul Police Department

The note-making practices of the ESPPD became a matter of discussion and criticism during the Inquiry. Accordingly, it is important at this stage to describe how officers of the ESPPD prepare notes, and how the notes are collected and preserved. Cst. Glenda Pedersen (Pedersen) described a three-step procedure. The first step is the preparation of duty notes by each officer of his or her observations in a numbered duty book. In some instances, officers might write a rough note on a piece of paper and then transfer the note to their numbered duty book. The second step is the creation of an incident narrative by that officer, setting out the contents of his or her notebook in narrative form. The third step is the creation of an incident report by the reader, who is usually a supervisor or senior member assigned to review all of the incident narratives created by each officer.

Mr. Paciocco questioned Bakema about the difference.

> Q. I take it Mr. Bakema, that you agree with the testimony of Sergeant Carter, now Chief Carter, that there's a difference between an incident report and a narrative report?
> A. An incident and a narrative?
> Q. Report.
> A. I believe so, yes.
> Q. Sir, the incident report is for the overall investigation, and the narrative report is the particular officer's summary of their own activities; is that correct, sir?
> A. That's correct.
> Q. You never filed a narrative report in your case, you just filed an incident report, sir?
> A. An incident report?
> Q. Yes?
> A. I believe so.
> Evidence, p. 3436-7, l. 16-25, 1-7

As Pedersen explained, only the reader is entitled to enter information in an incident report:

> Q. So, generally speaking, when an officer from East St. Paul Police creates an incident narrative report, the day that you create it remains, you can't change that, right?
> A. I can't change it.
> Q. But you can keep making additions?
> A. Yes, you can.

> Q. You can follow up, and they are all time stamped as you generate this document?
> A. Yes, you can continue to add to any dealings you may have had with that incident.
> Q. And you can, of course, go back and add to it, and developments as the investigation proceeds and progresses and you get more information, you include it in the document?
> A. That's correct.
> Q. Now, can other police officers get access to your incident narrative report?
> A. At the time that this report was completed, I believe there was only the supervisors that had access to changing anything on any one's narrative, such as spelling mistakes and that kind of thing.
> Q. When you say supervisor, who would you mean?
> A. The Chief would have had access and the reader.
> Q. I don't understand what you're saying, the Chief and the reader?
> A. The file reader, file reviewer.
> Q. Okay.
> A. It was usually Sgt. Carter was the file reviewer.
> Evidence, p. 1833-4, l.7-25, 1-14

The computerized system for receiving an incident narrative will show any changes to the narrative and the time when the changes are made. The initial entry is given a Field Name - "Old Values." Any change to a narrative is given a Field Name - "New Values." Pedersen went on to indicate that it was possible to pull up the incident narratives filed by other officers and read them. She said that she prepared her incident narrative involving Zenk while everything was fresh in her mind and then read the incident narratives of other officers. She read the incident narratives of others to gain more information.

10. The evidence of Constable Glenda Pedersen regarding her observations at the accident scene

Pedersen is a first class constable with 12 years experience and has been a member of the ESPPD for eight years. There were seven members of the service on February 25, 2005. On the morning of the fatal accident, she and Graham came on duty at 7:00 a.m. Bakema was also at the office. Woychuk was just coming off night duty. Graham took a call at 7:10 a.m. indicating that there had been an accident at Henderson Avenue and Highway 101 and directed her to that location. She got into a cruiser and went to that location only to discover that it was the wrong location. She then received a call from Graham that the accident was at Highways 59 and 101. She proceeded to that location, driving in the northbound lane of Highway 59 and arriving at 7:20 a.m.

Upon arriving at the scene, Pedersen observed that Woychuk had parked his cruiser in the westbound lane of the intersection blocking the intersection. Graham and Bakema had parked their cruiser in the southbound lane, at the north end of the intersection. As she arrived just south of the intersection, Graham directed her, by radio, to proceed north to the Highway 59 off ramp to divert southbound traffic away, in a westerly direction, away from the accident scene. Before leaving the area, she noticed a pickup truck in the median ditch of the southbound lane and a man (who she later knew to be Zenk) standing alone next to the truck. Bakema and Graham were standing near their cruiser.

Pedersen went to the location Graham had sent her, parked her cruiser and began diverting traffic west onto Highway 101. At 8:28 a.m., Bakema called and asked her to go to the Concordia Hospital to check on the status of the victims. She was replaced by another officer. As she passed by the accident intersection, on her way to the hospital, she observed Graham near the driver's side of the pickup truck holding up a dark coloured police uniform that he had pulled out of the truck. Woychuk was no longer at the scene. She said that Woychuk had left while Pedersen had been directing traffic.

Pedersen said that she arrived at the hospital at 8:48 a.m. and left at 9:43 a.m. returning to the accident scene at 10:00 a.m. She told Bakema and Graham that she had spoken to the Taman family members and had received particulars of the victims Taman and Beattie. At 12:40 p.m., she was told to go back to the station. At the station, she was told by Carter that the driver of the pickup truck was in custody and was with his lawyer. At 1:25 p.m., Zenk, who was in the process of being released from custody, asked Carter if he could be fingerprinted and photographed now, since he did not want to have to come back to ESPPD. Carter agreed and asked Pedersen if she would fingerprint and photograph him. Pedersen said that she took Zenk into the fingerprint room where she fingerprinted and photographed him. While doing so, she detected the smell of stale liquor from his breath and noticed that his eyes were glassy. She asked him a number of questions to complete a form and noticed that he was very deliberate and slow in answering her questions. She was with him side-by-side for about seven to eight minutes. Although she agreed that these were significant findings, she did not record them in her duty book. She said that she shared them with Carter a few days later, but Carter disagreed that she did. She said that she did not record the findings because she was not the investigating officer.

Pedersen said that she spoke to Bakema the next day when she came on duty at 7:00 a.m. Bakema told her that it was a very terrible thing that had happened: "It was a terrible thing for the accused, because it would affect his life and ruin it, as he was a police officer." She said that Bakema also mentioned that it was a terrible thing for the Taman family, but dwelled on Zenk and the consequences all this had for him. Bakema told her that he had known Zenk when he was a sergeant at the Winnipeg Police Service. She assumed that Bakema was in command of the file because he was the most senior officer. Although she thought initially that the file had been turned over to Graham, she learned later that it had been turned over to Carter.

11. The evidence of Constable Kenneth Graham regarding his observations at the accident scene

Graham had been a member of the East St. Paul Police Department (ESPPD) for three years on the date of the accident. Before that, he had been with the Dakota Ojibway Police for about three years. He was certified to use a roadside screening device. In 2006, he was discharged from the ESPPD for reasons not related to the investigation of this accident. He is presently self-employed, selling real estate.

Graham said that he received a telephone call from an unknown caller at 7:10 a.m. reporting a motor vehicle accident at Henderson Highway and the Perimeter (Highway 101). He said that before he could get the caller's name, the caller hung up. Pedersen set out for the accident in a cruiser. Woychuk, who was just coming off shift, set out for the accident in a SUV police vehicle, only to find out that the accident was at the intersection Highways 59 and 101. Graham and Bakema changed into their police uniforms and set out for the accident scene, driving southbound on Highway 59. Upon arrival, Graham directed Pedersen to divert traffic travelling southbound on Highway 59. Woychuk had not yet arrived. Although ESPPD has a roadside-approved screening device at the station, and Graham was certified to operate a roadside screening device, he and Bakema did not bring one with them.

Graham said that he and Bakema arrived at the accident scene at 7:16 a.m. to find traffic backed up and the Winnipeg Fire and Paramedic Service on the scene. He understood his responsibility as follows:

> "…to analyze the scene, attend to anyone that needs medical attention, preserve the scene, all of the evidence as good as possible, to control the scene and go from there."
> Evidence, p. 1927 l. 10-14

As far as who was to take charge of the file, Graham testified:

> Q. And wouldn't it be usual for a Chief to be taking on the investigation of an accident scene like this himself, sir?
> A. He would take it on himself or he would delegate it to whomever he feels should be doing it.
> Q. And was there discussion at the scene as to who is going to take charge?
> A. I was advised by Bakema that he was going to call out Sergeant Carter to be, basically, in control of the file.
> Q. Okay. But, of course, he couldn't be in charge of the scene because Sergeant Carter, at the time, wasn't at the scene?
> A. Correct.
> Q. So maybe we should break it off and consider first control of the scene.
> A. Okay.
> Q. And then consider control of the file. So with respect to control of the scene, was there ever any discussion held between you, Constable Woychuk, and Chief Bakema over what your relative responsibilities would be?
> A. No, there wasn't.
> Evidence, p. 1929-30, l. 5-25, l. 1-3

On the way over from the ESPPD, Bakema and Graham had not discussed how the accident scene was to be handled.

> A. No. We are so short of manpower, you just have to deal with what you can do at the time. And once the scene is under control, then you sit back and figure out who is going to do what.

> Q. Sir, wouldn't it make sense, if you are short of manpower, to try to allocate responsibilities very precisely so that you have the most efficient use of the personnel on the scene?
> A. It is kind of hard to do that. At the go time when there is chaos, you are not going to take your time. You have to do this and that. You deal with what you have to deal with. And when everything is under control, then you delegate.
> Q. Okay. So at the time when chaos is going on, you just have to fold yourself into the chaos, is that basically your position?
> A. That's right.
> Q. And, sir, I understand from your testimony, in earlier proceedings, that it was your understanding that Sergeant Carter was delegated the file?
> A. Yes.
> Q. And so, I take it, that would make him the investigator in connection with the criminal charges?
> A. That he would be the one that would be taking care of the file, seeing what charges are laid and what needs to be done on the file.
> Q. So he would be overseeing the investigation?
> A. Correct.
> Q. Now, of course, Sergeant Carter had not been at the accident scene?
> A. No, he had not.
> Q. Is that unusual at all, sir, in your experience, to have somebody delegated responsibility for an investigation of a traffic accident without attending the scene?
> A. That's the way the department ran. Sergeant Carter was the reader, the reviewer of the files, and he basically delegated who got what file.
> Evidence, p. 1931-33, l. 24-25, l. 1-18, l. 1-18

Graham said that he and Bakema got out of their cruiser and surveyed the scene to see "what needs to be done." Bakema went over the accident scene. There were paramedics at the Taman vehicle. After a couple of seconds, Graham said that he got back into his cruiser and backed it up on Highway 59, to just north of the weigh scales and parked it diagonally to stop vehicles going south, through the accident scene. He put out some cones and called Pedersen and asked her to block traffic. He waited for her to arrive and had a personal conversation with her, advising her to put the cones up. Graham said that he did not ask her to help with the accident scene, "because she is known not to be able to handle situations like this very well." He felt that he was better able to handle the situation, even though Pedersen was superior to him in experience. There were significant conflicts in the evidence of Graham and Pedersen. Although Pedersen said that she had pulled in behind Woychuk at the intersection and saw Graham at the intersection, Graham said that he did not see her or Woychuk there. Again, she said that she was directed by Graham to the intersection by radio and did not have a personal conversation with him. Neither of their duty notes recorded what had, in fact, happened.

Graham said that he then drove back to the accident scene. This time, he parked his cruiser diagonally north of the intersection of Highways 59 and 101. He said that he was there a couple of seconds before he saw Woychuk pull up in his cruiser into the turning lane. He was blocking the northbound drivers on Highway 59 who where making a left turn onto Highway 101. He got out of his vehicle and again assessed the scene. It was now 7:23 a.m. He looked ahead southbound and saw Bakema about 100 yards away, standing with a male (Zenk) by a Dodge truck and speaking to him. They were about 10 to 15 feet away from the truck. The East St. Paul fire responders were there attending to the Taman vehicle. Graham said that he spoke to one of the firemen and helped him put a tarp on the Taman vehicle. He then saw Bakema walk Zenk over to Woychuk's SUV but he did not see Balama put Zenk in the back of the vehicle. Once Zenk was in the SUV, Graham did not see Woychuk leave in the vehicle.

Graham said that Tara and Kristin Taman arrived at 7:25 a.m. and ran towards their mother's vehicle. He said that he did not feel that there was any need for them to see their mother and led them to his cruiser and put them in the back. He said that they called their father on their cell phone and were upset, yelling and crying. He took the phone from them and explained to Robert Taman where to come. Robert Taman arrived at 7:41 a.m. Robert Taman testified that he asked Graham to let his daughters out of the cruiser but Graham denied this. Graham said that he offered to drive the Tamans to the hospital but was told they would drive there on their own. Graham said that at 7:43 a.m., he told the Tamans to follow the ambulance, which was just leaving with Crystal Taman. However, Graham told the RCMP, in his interview, that the Tamans left at 8:15 a.m.

Graham said he was not sure when Zenk was put in Woychuk's cruiser but he was sure that it was before Tara and Kristin Taman arrived at 7:25 a.m. He also said that Zenk was nowhere near his vehicle. Graham said that after the Tamans had left, Bakema came over to speak to him. Bakema told him that the driver of the truck was a police officer and that he used to work with him on different shifts when he was a member of the Winnipeg Police Services out of District 3. Bakema said that he was going to call out Carter to take over the file because it was not proper for him to deal with it, since he knew Zenk and Zenk knew him. It was Graham's understanding that Bakema recognized that there might be a conflict. When Graham was questioned by the RCMP (with respect to an allegation of obstruction by Bakema) he never told them that this was why Carter was being called out. Graham told this Inquiry and the RCMP that he did not know Zenk, although he knew Zenk's parents from Brandon, where they both grew up. He thought Zenk's mother was a school teacher. He also said he never asked Bakema who the officer was, because he did not care at the time who he was.

After the Tamans left to go to the hospital, Graham went over to the Dodge truck to get particulars of the vehicle. He said that when he got into the vehicle, he smelled a strong odour of alcohol. Bakema was beside the vehicle and stuck his head in and tried to smell alcohol but he said he could not smell anything. He did not make a note in his duty book that he had smelled alcohol. When he was interviewed by the RCMP, he did not tell them that Bakema was with him at the time. Graham also removed a Winnipeg Police Service uniform and some other items from the truck. All of the items were put in an exhibit bag and recorded, except the uniform. Graham did not make a note in his duty book that he had removed the uniform. Graham also recalled that Bakema commented that he could not smell any alcohol on Zenk. He made no note in his duty book of Bakema's comment, nor did he disclose Bakema's comment in any of his interviews. His explanation was that he only put in his duty notes what he did personally and not what other officers did. He conceded that what Bakema had said would be a material piece of evidence. He also said that Bakema told him that he had put Zenk in Woychuk's cruiser because Zenk was cold and distraught.

Graham testified that the day of the accident or the following day, he and Woychuk had a conversation. Woychuk told him that he knew Zenk from Brandon and had gone to school with him. He said Woychuk also told him that he did not want to be responsible for ruining Zenk's career.

> "...he didn't want to be known as the cop that charged a Winnipeg member, because he wanted to get on with Winnipeg, he didn't want to have a bad reputation. And he indicated to me on the way to – on the way to the office that he could start to smell alcohol."
> Evidence, p. 2107-08, l. 19-25, l. 1-2

12. The evidence of Constable Jason Woychuk regarding his observations at the accident scene

On February 25, 2005, Woychuk had been with the ESPPD for four months. His only training as a police officer was a five-month course, offered by the Brandon Police Services through the Dakota Ojibway Police, and two months as an auxiliary officer with Dakota Ojibway. Although he had been told by Bakema when he was hired by the ESPPD that he would be riding with Graham for a month and would learn from him, he spent most of his time on his own. He said that he had minimal experience at the time of the accident. He had dealt with a few impaired drivers before the accident, but never as an investigator. He did not feel qualified to deal with the accident that occurred on that day.

Woychuk said that he had been coming off his 9:00 p.m. to 7:00 a.m. shift and had returned to the office when a call came in at around 7:10 a.m. advising of an accident at the intersection of Henderson Highway and Highway 101. Bakema, who was already at the office with Graham, asked him to keep working and to assist. Woychuk got into a Ford Explorer SUV police vehicle and started out for Henderson and Highway 101. On the way, he received a call on his radio from Graham directing him to Highway 59 and Highway 101. He made a U-turn and proceeded north on Highway 59 in the direction of the accident scene and arrived at 7:22 a.m. He believed that he recorded that time in his duty notes based on his call to dispatch, but he was not sure. He also believed that he parked his vehicle blocking "off the route that was going northbound on Highway 59 into the westbound Highway 101 turning lane," in the turning lane, but not in the intersection itself. He did not see any other officers when he arrived at the accident scene. He believed that he was the second vehicle on the scene.

Although Woychuk said that he saw the three vehicles involved in the collision upon his arrival, he did not leave his vehicle to offer assistance to the Taman vehicle. Since there were other people there, he believed that his responsibilities were to conduct traffic control at the intersection and to stop vehicles from going through. He was asked:

> Q. What responsibilities do police officers have in general when arriving at a major accident like that?
> A. To ensure people are safe, to maintain the scene and to investigate the scene.
> Evidence, p. 2219, l. 21-25

Woychuk said that he believed that his role was to block the scene and direct traffic because there were two more senior officers at the scene, Bakema and Graham. He understood that normally, the first member on the scene takes charge, but this can change, depending on the type of investigation and experience of the member. In his view, Bakema was in charge because he was the most senior.

Woychuk said that he set up some cones to divert traffic. He said that at 7:42 a.m., while he was sitting in his vehicle, Bakema came up with Zenk. He opened the back door and put him in the back of the cruiser, although Woychuk was unsure where his noted time of 7:42 a.m. came from. He was not sure whether Bakema brought Zenk up to his car first or if he put out the cones first, and said that he had to rely on his notes.

Woychuk said that he first observed Bakema and Zenk coming from the south and rear of his vehicle. He was able to see them through his rear view or side view mirror when they were five to10 feet behind his vehicle. He exited his vehicle when he saw them coming. He believed that Bakema opened the door and placed Zenk in the back seat of his vehicle.

After placing Zenk in his vehicle, Bakema had a short conversation with Woychuk outside his vehicle and advised him that Zenk was "impaired or possibly impaired" (He could not recall the exact words he used.) and was the driver of the truck. Carter made a note that Woychuk told him that "Harry" (Bakema) said that Zenk was "pissed." Woychuk was unable to tell the Inquiry whether Bakema had used the term "pissed." He had made no notes of his conversation with Bakema. Woychuk said that Bakema told him to keep Zenk there and not to do anything, as Carter would be coming. Woychuk was not sure whether Bakema told him that Carter was "on his way" or whether he was "going to call Carter."

Woychuk never asked Bakema the basis of his conclusion that Zenk was "pissed or impaired or intoxicated or possibly impaired," and Bakema did not offer any information to him. Woychuk said that, at the time, he did not consider it to be important. He now realizes that it would have been a good question to ask, since it would have alerted him to look for symptoms of impairment and help in the investigation of whether there were reasonable and probable grounds to believe that Zenk was impaired at the time of the accident.

Woychuk testified that he was uncomfortable with the instructions given to him by Bakema to do nothing. He gave this explanation:

> Q. Sir, how long were you supposed to do nothing, do you know?
> A. I don't know.
> Q. And how did that period of nothingness come to an end?
> A. Eventually I was told to take him to the station and that Chief Carter was there.

> Q. So you were told to take him to the station and that Chief Carter was there. Are you able to tell us how much time passed before that direction was changed?
> A. I am not able to tell you that, no. From what I recall, it felt like a long time, but—
> Q. I understand, from reading your transcripts, that you had some concerns about the position you were put in?
> A. Yes.
> Q. You had a person, who was apparently involved in a fatal motor vehicle accident, and who was the likely driver of the vehicle at fault, being put into the back seat of your vehicle by the Chief. What was it that made you uncomfortable, given the nature of the conversation you had with him?
> A. It was the direction that I was given to follow.
> Q. What was it that made you uncomfortable about the direction you were given to follow?
> A. I guess the point of not to do anything and wait for Sergeant Carter, or Constable Carter at the time, to come to the scene.
> Evidence, p. 2245-46, l. 17-25, l. 1-25

It was Woychuk's impression that Bakema did not want to deal with Zenk otherwise, "he would have given better directions for what he wanted me to do." Woychuk made no effort to determine whether Zenk had been drinking. He did not ask him to perform any sobriety tests. He did not get into the back seat and try to smell his breath. He did not try to see if Zenk could manipulate things like documents in his wallet. He said that he would have investigated Zenk for possible impairment if Bakema had told him to do so.

> Q. Had he told you to see if you could smell any alcohol on this man's breath, would you have done so?
> A. Yes.
> Q. Did he tell you that, sir?
> A. No, he didn't.
> Q. Are you sure of that?
> A. I'm sure of that, yes.
> Evidence, p. 2253, l. 9-16

Bakema had given a document to his counsel (Exhibit 92) in which he stated that he told Woychuk to put Zenk in the back of his vehicle, that he could "not smell anything on this male because of the cold outside" and that: "I also told him to sit in the vehicle with him and see if he could detect any alcohol in a more confined space." Woychuk testified that Bakema never told him that he could "not smell anything on this male." Moreover, he did not tell him to sit in the vehicle with Zenk to see if he could smell alcohol in a more confined space.

Woychuk said that Bakema told him that the person he put in the back of his vehicle was an officer with the Winnipeg Police Service. Woychuk was aware that Bakema had been with the WPS for 32 years and had worked at the same police station as Zenk, although not on the same shift. After Bakema left, Woychuk got back in the driver's seat of his vehicle. He saw Zenk "looking, basically, straight ahead." He seemed to be having difficulty swallowing. He formed the opinion that Zenk was either injured or in shock over what had just occurred. He asked Zenk if he was injured and told him that an ambulance was on its way. Zenk did not respond. He said that Zenk was "very silent." Woychuk tried to have conversation with Zenk but was not getting any answers. Woychuk wrote in his incident narrative, but not in his duty book, that Bakema told him that Zenk was "distraught over the accident" and to stay with him due to his condition. What Woychuk did recall (although he made no note of it) was Bakema telling him to keep Zenk there and Carter was coming. He also wrote in his duty book that Zenk did not want to talk "due to his condition" although he does not know, now, what that condition was. Woychuk testified that while Zenk was in his vehicle, Woychuk got out frequently to monitor traffic.

While Zenk was in Woychuk's vehicle at the accident scene, Rosser and Fontaine, the two Selkirk paramedics, arrived and came up to his vehicle. Woychuk said that Rosser got into the back seat of his vehicle with Zenk while he waited outside. After a few minutes, Rosser exited his vehicle and told him that Zenk had declined any medical attention and signed a waiver. Rosser also made a comment, or motion (cup to mouth motion) that he either detected some alcohol or that he (Zenk) may have been drinking. Woychuk did not follow up on it.

It was apparent that Bakema had decided not to call Carter to come to the accident scene, because he directed Woychuk to take Zenk to Carter at the ESPPD. Woychuk said that Bakema did not give him any explanation why he wanted him to do so. Up to this point, Woychuk was concerned because he had been instructed by Bakema not to do anything, yet, at the same time, he had been given information that Zenk was or could be impaired. Woychuk felt that he had to act on the information reasonably quickly or he would be in trouble with any breath samples that might later be taken. He said that he left for the station, with Zenk in the back of the cruiser, at 8:08 a.m. and arrived at the station at 8:12 a.m. He said that enroute to the ESPPD, he detected a slight odour of liquor from Zenk for the first time and made a note of it in his duty book and incident narrative. Woychuk said that he had not detected any smell of alcohol earlier, even though he had been alerted earlier by Rosser that Zenk may have been drinking. His explanation was that he had a cold and was sucking on Halls cough drops all day. Woychuk said that he told Bakema that Rosser had said that he had smelled alcohol.

Although Woychuk's duty notes indicate that Carter met him at the rear door upon his arrival, he testified that, in fact, he left Zenk in his vehicle and went into the station and spoke to Carter. He told Carter that he had Zenk, a police officer with the Winnipeg Police Services, that Zenk was the driver involved in the collision and that he had smelled a slight odour of alcohol from him. He and Carter went out to the cruiser. Carter spoke to Zenk and brought him into the office. Woychuk made no note of the conversation between Carter and Zenk and could not recall what was said. Although he noted in his incident narrative that when Carter brought Zenk into the office, "he (Zenk) appeared to be unsteady on his feet," he made no such note in his duty book. In his interview with Mr. Clifford, Woychuk said that Zenk was "staggering." In his interview with the RCMP, he said that Zenk was "stumbling a little bit" and "slurring in his speech." However, Woychuk said that he had no independent recollection of those observations.

Woychuk made a note in his duty book that at 8:18 a.m., Carter placed Zenk under arrest for impaired driving causing death, cautioned him, gave him a police warning and made a breath demand. However, Woychuk made no note in his incident narrative that Carter had cautioned him or gave him the warning. He made a note that at 9:05 a.m., Carter requested that Woychuk bring Zenk from the interview room into the breath room. Woychuk said that he heard Zenk advise Carter that he did not wish to provide a sample and made a note of it in his duty book and incident narrative. He also made a note in his duty book that Carter then read a formal demand for breath samples at 9:08 a.m. but Zenk refused to provide breath samples. He made a note in his duty book that at 9:09 a.m., that Carter gave Zenk another opportunity to provide a breath sample, but that Zenk refused.

Woychuk testified that he was not sure on what day he completed his incident narrative. As already noted, the ESPPD records generated by the computerized system for recording an incident narrative show any changes to the narrative and the time the changes are made. The initial entry is given a Field Name of "Old Values." Any change to a narrative is given a Field Name of "New Values." Woychuk's incident narrative indicates that a revision was made to his report on February 26 at 6:52:27, the end of his next shift. Woychuk testified that when he finished his shift that day, he spoke to Bakema about his notes and his concern with the time delay and the reason for transporting Zenk to the ESPPD. He was told by Bakema to put in his notes that the reason that he was transporting Zenk was to complete a Traffic Accident Report to account for the delay. He also mentioned to Bakema that Rosser had commented about the smell of alcohol. He was told by Bakema that he didn't need to put that in his notes. Although he told the RCMP in his first interview that Bakema told him not to put in his notes that he had said that Zenk could be impaired, he could not recall at his second RCMP interview or at this Inquiry whether Bakema told him not to put that in his notes.

There were a number of New Value additions made by Woychuk to his incident narrative on February 26 at 6:52:27. One addition was that he set up cones and directed traffic north on Highway 59. He denied that he made the addition to use up some time at the scene so he would be with Zenk a shorter period. He also added that at 8:08 a.m., he transported Zenk to ESPPD "to get him away from the accident scene." Woychuk could not recall where he received that information. On February 27, he added as a New Value three observations relevant to alcohol consumption not in his initial narrative report, or in his duty notes, which he could not explain. These observations included the detection of a slight odour of liquor while transporting Zenk to the ESPPD. He advised Carter that a slight odour of liquor had been detected and observed that Zenk was unsteady on his feet while walking into the office. He could not explain why these three observations suddenly appeared in his narrative report two days later. Woychuk said that the reader of the file could have sent it back, requesting further additions. He did not know who the reader of the file was; it could have been Carter or Bakema. He could not explain why he revised his earlier report. Woychuk also revised his earlier narrative on February 27 to indicate that at 8:08 a.m., he transported Zenk to ESPPD "to get him away from the accident scene." He said that he did this because he was told by Bakema to do so.

It was obvious that Woychuk's conscience was bothering him. A year later, on February 24, 2006, he picked up Carter who was having a meeting with Martin Minuk, the independent prosecutor, to discuss the prosecution of Zenk. Woychuk explained to Carter that he was having concerns about what he had been told to put in his notes. He didn't want to be subpoenaed and have a set of notes that differed from what he felt he would have to testify under oath. He told Carter that his notes were not his and that he was new and was taking directions from Bakema. Woychuk's notes matched the notes prepared by Bakema and Graham.

A second meeting took place with Carter on April 10, 2006 at 4:00 p.m. Again, Woychuk told Carter that Bakema directed him to make notes and that he knew it was wrong and he should not have done it. On April 21, 2006, he told Carter that he believed that Bakema and Graham didn't want to be involved and so Zenk was given to him, so that he would, in turn, give Zenk to Carter. Carter told him to tell the truth when speaking to Minuk. Woychuk spoke to Carter again on April 27 and asked him whether he should be worried. He said that Carter told him to tell the truth. On May 15, Woychuk spoke to Carter again inquiring whether Minuk wanted to speak to him. He subsequently learned that the RCMP had been called in to investigate the matter. On May 24, 2006, he was interviewed by the RCMP.

13. The evidence of Chief Harry Bakema regarding his observations at the accident scene

Bakema had been a police officer since 1971 and had retired in 2003 as a sergeant with the Winnipeg Police Service (WPS). He had reached the highest in command at District 53 and was a qualified breathalyzer operator. After he retired, he applied for and was hired as Chief of the ESPPD on April 15, 2004. Bakema had only been 10 months on the job and was at the office at 7:00 a.m. the morning of the accident, when the call came to Graham that there was an accident on the north Perimeter. He concluded that he needed all of his officers. Woychuk, who was coming off his shift, was directed to the accident scene. Pedersen, who was at the station, was sent to the scene in a separate vehicle. Bakema and Graham got dressed in their uniforms and drove to the scene together. Although the caller had indicated that the accident was at Highway 59 and Henderson Highway, the accident was in fact at Highway 59 and Highway 101. Bakema had been permitted to be present during the testimony of the other witnesses and heard other officers indicate where vehicles were parked during the investigation. However, he seemed unable to indicate on an overhead photo blow up (Exhibit 66) where his vehicle was parked when he arrived at the scene, until he was directed to the location by Mr. Paciocco. The evidence was that his vehicle was parked in the southbound lane of Highway 59 in the intersection.

Bakema had not formed any plan with his officers how he intended to conduct the investigation. Upon arrival, he and Graham left their vehicle and proceeded towards the damaged vehicles that were in the southbound lane, south of the intersection. Bakema went to the right, towards the green (Beattie) vehicle while Graham went to the left. He gave no direction to Graham what to do. Bakema noticed that the green vehicle was damaged in the rear. He then went to the yellow (Taman) vehicle and observed that it had sustained damage both to the front and back. He said that he then noticed a person standing beside a blue truck. It was about 50 yards away off the left shoulder on the median, between the north and south bound lanes. He went in the direction of the person, who turned out to be Zenk. He said that he did not recognize Zenk immediately.

Zenk was walking around his truck shaking his head. Bakema said that he did not look to see if there was any damage to Zenk's vehicle. But, he must have realized, after noticing the damage to the back of the green vehicle and the front and back of the yellow vehicle and the tires marks made by the truck as it left the southbound lane onto the median, that it was the truck that had caused the accident. Bakema said that he did not look for any damage. Simple logic, however, should have led him to conclude that it must have been the blue truck that struck the yellow vehicle and caused it to crash into the green vehicle.

Bakema said that he went up to Zenk and asked him if he was the driver of the truck and Zenk replied that he was. He asked Zenk, whom he described as "distraught," whether he was okay and Zenk replied that he was. Bakema said that he did not recognize Zenk while he was speaking to him because Zenk's head was bent over. He said that he put his arm around Zenk and proceeded to lead him to Woychuk's vehicle and put him inside the vehicle because the weather was cold and because of Zenk's state of mind. Bakema said: that on the way to Woychuk's vehicle, Zenk said: "I'm a cop." Bakema then bent over and looked at him. He said that when he bent over to look at him, he recognized him and said "Derek." He noticed blood on his nose. He said that when he put him into Woychuk's vehicle, he told Woychuk to see if he could smell anything because he had been unable to smell anything walking Zenk to Woychuk's vehicle. Although Bakema gave the same information to the RCMP who interviewed him and the same sworn evidence to commission counsel, he made no note of that direction to Woychuk either in his rough notes, his duty notes or his incident narrative.

Bakema was assigned cell phone number 204-612-2338 by his department. A transcript of calls made and received on February 25, indicate that between 7:37 a.m. and 9:36 a.m., four calls were made by the ESPPD Police Dispatch, which Bakema explained were made in connection with the accident. The next call was at 9:47 a.m. and was made to Royal Dodge Jeep Chrysler car dealer. Bakema could not explain how that call was made, as he did not have a vehicle purchased from that dealership, nor did the ESPPD deal with that dealership. The records indicate that at 11:02 a.m. and 11:19 a.m., two, one-minute calls were made to the Divisional Commander of Division 13. A third call was made at 11:20 a.m. to the Division Commander and lasted 4.517 minutes. Bakema explained that he had called Division 13, where Zenk worked, to alert them to the fact that Zenk would not be able to work his shift. Although the two, earlier one-minute calls can be explained by the fact that he probably had difficulty reaching the Division Commander, they do not explain why it took 4.517 minutes to relate that Zenk would not be in for his shift.

Keith McCaskill (McCaskill), the current Chief of the Winnipeg Police Service, was the Divisional Commander of Division 13 at the time. McCaskill testified that Bakema called him to tell him that one of his officers, Zenk had been involved in a three-car fatality at Highway 59 and the Perimeter. He asked Bakema tc keep him informed. McCaskill then spoke to Acting Deputy Chief Corinne Scott and told her what had happened. The cell phone records indicate that at 4:18 p.m., a 7.717 minute call was made to the Deputy Chief of Operations of the Winnipeg Police Service. Bakema could not remember making the call. Corrine Scott, the Deputy Chief at the time, made detailed notes of the telephone call which were introduced as Exhibit 161. The notes outline the information that she received from Bakema about the accident involving Zenk and the charges that were going to be laid.

During the investigation, Bakema said that he became aware that Zenk had spent the previous evening and the morning hours at Branigan's, a restaurant, with about two dozen police officers from his division after their shifts and later with a dozen of his colleagues at the home of Sgt. Sean Black (Black). Bakema said he felt that the ESPPD did not have sufficient officers to conduct a proper investigation of Zenk's activities that evening and asked the Deputy Chief of the Winnipeg Police Service to have their Professional Standards Unit (PSU) conduct an investigation on behalf of his force.

Although Bakema had assigned the Zenk investigation to Carter, he continued to be involved in the investigation. He interviewed, Beattie, Bukowski and Rosser. He also instructed Woychuk to interview Shaw and Don Fotti, one of the paramedics who attended to Crystal Taman. He also prepared a list of the witnesses to be called at trial.

14. The evidence of Sergeant Cecil Sveinson regarding his conversation with Chief Harry Bakema at the accident scene

Cecil Sveinson (Sveinson) is a 34-year-old patrol sergeant in-charge of the Aboriginal Diversity Policing section of the Winnipeg Police Services. He began policing on January 13, 1992. At the time of the accident, he was (and still is) assigned to the training division doing driver training. He is a first cousin of Crystal Taman. Although Crystal was older than him, they had grown up together and he considered her a remarkable person.

Sveinson learned that Crystal had been involved in a fatal accident when his wife called him a work between 2:30 p.m. and 3:00 p.m. He decided to drive to the crash scene to say a prayer for Crystal in accordance with his native custom and arrived there about 3:30 p.m. He was met at the scene by an ESPPD police officer and told the officer his purpose. The officer asked him to wait a moment and then contacted Bakema who was still at the scene. Bakema drove over in his cruiser to speak to him and he told Bakema that he wanted to do a ceremony for his cousin. Bakema told him that he could do his ceremonial prayer after the RCMP, who were taking measurements at the scene, had completed their work. Bakema invited him into his cruiser because it was cold and drove him over to the scene.

During the drive, Bakema initially expressed some concern, and Sveinson asked him, "It's really stressful about what's going on here with all the traffic." Bakema answered: "Yeah, well that...plus the fact that it's another police officer." Sveinson was shocked and began to cry. He said: "Winnipeg." Bakema said: "Yes." Both were quiet for awhile and Sveinson was crying. He then asked Bakema, "Was he..." (about to ask if the officer was drunk) when Bakema interrupted: "Pissed. Oh, yeah, we had to get him out of here right away." Again, he was in shock. Bakema said that there was a witness that saw him all over the road: "He didn't stop, he didn't brake, he drove right into the back" of Crystal's vehicle and knocked her right into another vehicle. They continued to engage in small talk. After 15 or 20 minutes, Sveinson was allowed to perform his ceremony.

From the accident scene, Sveinson drove to the home of Robert Taman's parents where the family had gathered. There, he spoke to the family and told them what Bakema had told him. He was worried because Robert Taman went from denial to anger. He stayed with the family until 1:00 a.m. or 2:00 a.m. He later learned from one of his close friends and colleagues, Patrol Sergeant Jeremy Harewood, that the driver was Derek Harvey-Zenk. Sveinson had known Zenk since Zenk started his career and he had trained and certified in the use of the laser-speed timing device. He was also told that Zenk and others had been with him at a drinking party earlier with people from his shift and had gone after the party to the residence of Sean Black, another officer that he knew. Sveinson was told that Zenk had tried to leave a few times throughout the night, but some people had stopped him. "Ultimately, somehow he got his keys and left."

Sveinson felt angry, shocked and betrayed because he had trained Zenk. Although the Winnipeg Police Service has a wellness officer to counsel officers who may have experienced grief, no wellness officer ever came to see him. As will be noted later, a wellness officer attended at Zenk's home the morning of the accident to provide him with counselling.

15. The evidence of Sergeant Norman Carter regarding his observations at the East St. Paul Police Department

Chief Norman Carter (Carter) was a police sergeant at the time of the fatal accident and had been with the ESPPD since the fall of 1986. He started his police service with the Altona Police Service in 1982 and was with Altona until 1986. In the fall of 1986, he started service with the ESPPD. He was appointed Chief of the ESPPD on March 15, 2006 after the contract of Harry Bakema was not renewed by the East St. Paul council and mayor.

Carter was scheduled to work on the day of the accident and usually went into the station between 8:30 a.m. and 9:00 a.m. At 7:38 a.m., he received a call at home from the dispatcher advising him that there had been a serious accident and that he was wanted at the scene by Bakema. He arrived at the office at 8:00 a.m. and went to get the keys of a vehicle. He intended to pick up a cruiser and drive to the scene. He told Special Cst. Olfert (Olfert) to let Bakema know that he would be on his way, and was told by Olfert that Bakema wanted him to stay at the station and that Woychuk was on his way to the station. Carter was not told why Woychuk was coming to meet him at the station and was concerned that his sister, who travelled that route to work, might have been involved in the accident.

Carter said that Woychuk arrived at 8:12 a.m. He met Woychuk in the hallway of the station and was told that he had to speak to him. They went into a room and closed the door. Woychuk told him that there had been a fatality and that he had a male subject in the back of his cruiser who had declined medical attention, who was a police officer and "may be impaired." He repeated several times that he had smelled a slight odour of alcohol, but said that he could not really tell because he was all stuffed up with a cold. He said that Bakema had told him to bring the prisoner back to the station because he (Carter) was more experienced and could handle this. Because the call had come in at 7:38 a.m. Carter realized that 40 minutes had gone by and asked Woychuk if he had cautioned the prisoner and chartered him. He was told by Woychuk that he had not. Carter realized that Woychuk should not have left Zenk alone in the back seat of the cruiser and went out to the cruiser. He opened the door, identified himself as Sergeant Carter and detected a strong odour of liquor on him from a foot away. However, Carter made no rough note of what he had smelled, nor did he mention it in his narrative or make a note of it in his duty notes. Moreover, he did not mention it to the RCMP officer who interviewed him. Carter also noticed that the prisoner was not handcuffed, which was usual procedure when escorting a prisoner to the station, unless there was some good reason not to. At 8:15 a.m., Carter asked the Zenk to step out of the vehicle and escorted him to interview room number one.

While escorting Zenk into the station, Carter said that he observed that Zenk was unsteady on his feet walking on the tile and carpeting. At 8:19 a.m., he said that he formed the opinion that Zenk was impaired and placed him under arrest. He also advised Zenk of his right to counsel. He said that he arrested him on the basis of the information he received from the dispatcher who called him from the station, from Woychuk who told him that he had a male subject involved in the fatality in the rear of his vehicle, and from his own observations. Although he was not specifically told that Zenk was the driver who had caused the accident, he assumed that it was Zenk.

At 8:21 a.m., Carter made a breath demand to Zenk. He asked Zenk whether he understood the demand. Zenk told him that he did and agreed to the demand. Between, 8:21 a.m. and 8:34 a.m., Zenk was given the opportunity to call his lawyer in private. Zenk asked for a pen and paper and it was given to him. Carter said that at 8:34 a.m., Zenk asked him, "I am sorry, did you give the demand?"

At this point, Carter noticed a strong smell of alcohol, a flushed face, glassy bloodshot eyes and dried blood on Zenk's nose. At 8:55 a.m., he noted that Zenk was off the phone. Zenk asked him what time he had called his lawyer and he gave him the time. At 9:06 a.m., Carter asked Woychuk to bring Zenk into the breathalyzer room. At 9:07 a.m., he asked Zenk again to provide a breath sample and Zenk replied: "No." At 9:09 a.m., Carter read Zenk the refusal warning and then read him the breath demand again. Zenk replied: "I am refusing."

Although Carter's rough notes, his duty notes and his narrative report indicate that at 8:21 a.m., he made a "blood" demand and not a "breath" demand, he is absolutely certain he made a breath demand. At 10:04 a.m., Carter contacted the Crown's office and spoke to the duty Crown, briefing him on the incident. At 10:35 a.m., he received a call from Martin Minuk (Minuk), the independent prosecutor and briefed him. Minuk authorized charges of refusal to provide a breath sample, impaired driving causing death, dangerous driving causing death and criminal negligence causing death. Minuk told him that Zenk could be released on a Promise to Appear, without conditions.

Carter's notes were the subject of much criticism by counsel because they indicated that at 8:21 a.m., he had made a blood demand when he said that, in fact, he had made a breath demand. He also testified that he made his narrative report from his rough notes before he made his duty notes.

I am satisfied that Carter did make a breath demand at 8:21 a.m., and not a blood demand, for a number of reasons. He knew that a blood demand can only be made where an accused is unable to provide a breath sample. Although his narrative report at 8:21 a.m. says that he made a blood demand, the next sentence goes on to say that: "He (Zenk) advised he understood and agreed to provide breath samples." His narrative indicates that at 9:06 a.m., he requested Woychuk to bring Zenk into the breathalyzer room. His narrative indicates that at 9:07 a.m., he asked the subject to provide samples without indicating breath or blood samples. However, his rough notes, the first notes he prepared, indicates a demand for breath samples. Those rough notes were prepared on February 25, the day of the fatal accident. His narrative report and duty notes were prepared until February 27, since he was off on February 26.

Although he could give no explanation for the error, it appears that, in the rush to complete his narrative report and duty notes on February 27, Carter had merely repeated the error that he had made in his rough notes, with respect to the demand he made at 8:21 a.m. He was obviously aware that his notes were in error because there is a note on the brown file folder that had to be made after March 10 that he had advised Minuk about the error in using the word blood instead of breath in his notes and narrative report.

Carter asked Zenk if he wanted to call his wife and his police association. Zenk said that he did and made the call. Carter asked him if he wanted to discuss the incident with him and Zenk declined. At 11:28 a.m., the office clerk advised Carter that Zenk had been banging his hands and head on the wall of the interview room. Carter went to the room and found him upset and crying. Carter advised Zenk that he had to provide a TAR but Zenk declined stating that he had seven days to report. (Eventually, Zenk appeared at the station on March 30, 2005, and completed the report.)

While Zenk was at the station, Katherine Beuti, his counsel arrived. When Pedersen arrived at the station, Carter directed her to photograph and fingerprint Zenk. After this was completed, Zenk was released and left the ESPPD with his counsel. He said that although Zenk was still impaired when he left, he was not concerned that he might repeat the offence because he was with his lawyer.

Carter said that on February 24, 2006, Woychuk drove him to a meeting with Minuk. On the way back to the station, Woychuk disclosed to him that the notes he made of the incident were not his notes. Woychuk said that he wrote down what Bakema told him to write, to coincide with Bakema's and Graham's notes. Woychuk also told him that Bakema said that Zenk was "pissed at the scene." Carter told Woychuk that this would have to be disclosed to Minuk. He made a note of the conversation two weeks later on March 5. Carter had a second conversation with Woychuk on April 10, when Woychuk came to his office to discuss the accident and repeated what he had told him on February 24: that Bakema said that Zenk was "pissed" and Bakema had directed him at the station how he should write his notes. Woychuk admitted to Carter that, in retrospect, he knew that what he had done was wrong, that he should not have done it, but Bakema had instructed him to do it.

Carter spoke to Woychuk on April 21 and advised him that he had disclosed to Minuk what he had told him. Woychuk said that he did not feel that Bakema was intentionally trying to cover up for Zenk but that Bakema and Graham were just "chicken shit to deal with this themselves, because Zenk was a cop and there were concerns as to what other police officers would think of them."

Carter told Woychuk that he had to tell the truth. On April 27, Woychuk spoke to Carter again. Carter said that Woychuk was worried and repeated that he had only done what Bakema directed him to do. Carter said that on May 18, Woychuk asked him if Minuk wanted to speak with him as he had heard nothing, and wanted to know what he thought would happen. Minuk had asked the RCMP to investigate the allegation against Bakema, and Woychuk was worried about what would happen to him.

When it was discovered that a number of WPS officers, including Zenk, had gone to Branigan's after their shift to wind down, Minuk had asked Carter to obtain a search warrant to seize the credit card receipts at Branigan's in order to determine, if possible, the number of drinks that Zenk had purchased over the evening. Carter said that he did not feel that he could obtain a warrant because he could not swear in the information to support the application that receipts "will" be found at Branigan's as he believed was a necessary requirement of section 487 of the Criminal Code. Carter did not tell Minuk this. Although Minuk asked him on two subsequent occasions what were the results of the search, Carter never told him that he had never applied for the warrant and assumed that he did not have to do so, once the RCMP got involved.

It was the responsibility of the senior officer at the scene, in this case Bakema, to assign an investigator to the file. Since Bakema had not assigned the file to anyone, Carter said that he assumed charge of the investigation on March 1. Although the practice was, that once assigned, the investigator interviewed the witnesses, Bakema continued to interview witnesses. Bakema had also contacted the Winnipeg Police Service and had requested their Professional Standards Unit to conduct an investigation of the police officers who had attended Branigan's and later at Black's residence that evening. The investigation and report will be discussed in Part B.

16. The evidence of Constable Bryan Maloney regarding the note-making practices of Bakema and Graham

Maloney has been a police officer since 1994. He was trained by the Brandon City Police and came to ESPPD in 1995. He said that he was away on a fishing trip when the accident happened and returned a day or two after. When he returned to work, he read the file electronically and saw that there were issues, particularly a Charter issue: the 40-minute gap between the time Zenk was arrested and the time he was transported to the ESPPD. He spoke to Carter about it. Carter did not disagree with him and said that he had arrested Zenk once he was taken to his office. Maloney spoke to Woychuk who told him that Bakema had brought Zenk to him and told him that he was impaired and later told him to take Zenk to Carter. Woychuk also said that he knew Zenk from Brandon. Maloney testified that he had been trained to make his own notes and not to collaborate with any other officer. He said that he had seen Bakema and Graham making their notes together on about a half-dozen other occasions.

Maloney said that while he was waiting outside the Inquiry room to testify, Graham came walking down the hall and went up to him and said: "Maloney, Maloney, you guys are nothing but a bunch of f… traitors." Maloney responded: "Ken, I wasn't even there." Graham replied: "I know you weren't there." Graham walked back into the hearing room and was offered the opportunity to enter the witness box and respond to Maloney's testimony. He never took up that offer.

17. The testimony of Derek Harvey-Zenk

Zenk is 34 years old and resides in Brandon, with his wife and his 2 ½-year-old child. He has a Bachelor of Arts degree from the University of Winnipeg and began service with the Winnipeg Police Service on December 4, 2000. He went to high school in Brandon but said that he did not know Graham or Woychuk. He went to school with Woychuk's older brother, John. Zenk was a police officer until July 27, 2007 when he resigned from the WPS.

Zenk said that on February 24, 2005, he started his shift at 2:30 p.m. and ended it at 10:30 p.m., two hours earlier than he normally did so that he could go to Branigan's. He said that he could not remember when he arrived at Branigan's. He said that since the accident, his memory is sporadic. His next clear memory was the day after the accident. He said that he has been meeting regularly with a psychologist who told him that his memory problem is probably due to post-traumatic stress disorder. However, he did not provide this Inquiry with a psychological report from his psychologist to support that opinion.

Zenk said that he did not recall meeting with Rosser after the accident, he had no recall of furnishing Woychuk with his driver's licence or of asking Carter for pen and paper. He had no recall of any conversation with Carter other than saying to him "excuse me." He had no recollection of signing his Promise to Appear. He had no recollection of being fingerprinted or photographed. He had no recollection of attending at the hospital with Paul Isaak, the WPS wellness officer or speaking to a doctor at the hospital.

Zenk was referred to Dr. W.L. Davis, a psychologist, by his trial counsel, Richard Wolson, for consultation and report. On July 17, 2007, Dr. Davis reported to Wolson, as follows, under the heading Mental Status Examination:

> "Mr. Zenk cried repeatedly throughout the assessment whenever the topic touched on the accident and its tragic outcome for the accident victim. At these times he was struggling to compose himself in order to provide verbally understandable information in response to my questions. This uncontrolled sadness was appropriate however to the context of our discussion and there was no evidence of cognitive impairment, memory loss or psychomotor retardation or agitation. His thought processes were logical, rational and coherent although repeatedly self condemning."

Zenk described his memories of the events of the accident as sporadic: like snapshots, pictures of instances, sound bytes. He said that he had no distinct memory of when he went to Branigan's, where he sat, or who he had been reacting with that evening. The only faces he could remember were Ted Michalik and Lloyd Swanson. He had no recollection of eating 60 chicken wings, although he usually started with 40. He had no recollection of the amount of beer he drank that night, although he usually had a couple of beers with wings. He had no recollection of going to Sean Black's residence after leaving Branigan's, although he remembered an arm wrestling match in which he was involved. He had no other recollection of being at Black's home or leaving his home.

He said that he had no recollection of the accident, except feeling an impact and then a panic feeling to stop his truck. He had no recollection of using his cell phone, although he could recall being cold outside and saying to his wife: "I can't talk now." He said that he had no recollection of any conversation with any of the witnesses at the scene of the accident. He had no recollection of contact with Bakema, although he knew who he was because he worked in Division 13 with him. He had a recollection of sitting in the police cruiser and the cruiser. He had no memory of arriving at the ESPPD or contact with Carter or with a lawyer. He did recall filling out a traffic accident report on March 30, 2005.

Zenk's stated inability to recall the events of the evening prior to the accident, the accident itself and his presence at the ESPPD, except for the "snapshots" he related to this Inquiry is inconsistent with the report of Dr. Davis concluded, on July 17, 2007. Dr. Davis found "no evidence of cognitive impairment, memory loss or psychomotor retardation or agitation."

18. The opinion of Sergeant Paul Lobsinger regarding the quality of the investigation conducted by the East St. Paul Police Department Police

Sergeant Paul Lobsinger has been a member of the Toronto Police Service since March 18, 1980. On January 2, 2008, he commenced a two-year secondment to the Police College in Aylmer, Ontario as an instructor in the academic section. He currently instructs new recruits in the area of *The Ontario Highway Traffic Act*, *Ontario Provincial Offences Act* and various related pieces of provincial legislation. That instruction also includes impaired driving and collision investigation. His career began in traffic where he remained for 12 years performing many of the duties associated with traffic investigation. In 1983, he became a qualified breathalyzer technician and performed more than 550 breathalyzer interviews. He has arrested hundreds of drinking drivers and has been assigned the investigation of motor vehicle collisions.

Sergeant Lobsinger was provided with the entire investigative file and asked for his opinion as to the adequacy of the investigation. It was his opinion that there were major investigative errors "that would eventually have proven fatal to all or most of the charges that were placed before the court." I do not think that it is necessary to review his reasons and conclusions. His reasons and conclusions are fully supported by the evidence that has been heard at this Inquiry. I want to express my gratitude to Sergeant Lobsinger for his assistance.

19. Findings of fact regarding the evidence of Harry Bakema

Bakema was not a credible witness. His evidence was conflicting, contradictory and evasive. His explanation that he did not realize who Zenk was because his head was bent over when he went to speak with him was not supported by Shaw, Beattie or Tara Taman. It was simply false testimony. Shaw said that there was a conversation between the officer and Zenk that lasted at least five minutes.

Beattie also witnessed a conversation between Zenk and a police officer. She said: "It looked like they were standing talking". Bakema told Pedersen that he knew Zenk when he was a sergeant at the Winnipeg Police Service. I am satisfied that Bakema recognized Zenk when he went over to the truck and had a conversation with him. It is also likely that he smelled alcohol coming from Zenk. Bakema had been a qualified breathalyzer operator when he was a member of the WPS and was trained to recognize a motorist who had been drinking. Bakema told Cecil Sveinson that Zenk was "pissed" and they "had to get him out of there." He told Woychuk that Zenk was "pissed" or "impaired" or "possibly impaired." Bakema's denial of their evidence was simply not credible.

Bakema knew that he should not be investigating the file. He acknowledged that an investigating officer who knows a suspect, even casually from a prior working relationship, has a duty to stay out of the investigation because of a potential allegation of conflict of interest. More significantly, he did not want responsibility for the file because he did not want to be criticized for arresting a fellow officer and known by his former colleagues as ruining Zenk's career. He was sympathetic to Zenk. He told Pedersen and Sveinson that the accident would ruin Zenk's career and he felt sorry for him. He did not turn over the file to Graham, who was the next senior officer on the scene, because he knew that Graham also did not want to be known as an officer who ruined a fellow officer's career. The solution for Bakema was to dump the responsibility for Zenk on Woychuk, and instruct Woychuk to take him to Carter.

Bakema said that he had made a note that he placed Zenk in Woychuk's vehicle at 7:40 a.m. This notation cannot be incorrect. A letter from Interlake Regional Health Authority dated June 12, 2006 indicates that the call for paramedics was received at 7:17 a.m., Fontaine and Rosser were enroute at 7:20 a.m. and arrived at 7:38 a.m. They departed in their vehicle at 7:56 a.m. Rosser and Fontaine said that when they arrived at the accident scene, they immediately went to Woychuk's vehicle, where Fontaine and then Rosser, dealt with Zenk. Shaw said that the accident happened at 7:07 a.m. and 10 minutes later, the first police officers arrived at the scene. He also said that he saw an officer speaking to Zenk for about five minutes before that officer led Zenk past his vehicle. This means that Bakema must have placed Zenk in the vehicle earlier. Bakema denied that he deliberately noted 7:40 a.m. to explain away the inordinate delay that Zenk spent in Woychuk's vehicle. He had not been cautioned or advised of his right to counsel before being taken to the station at 8:08 a.m. It is more likely that Zenk was placed in the vehicle before 7:40 a.m.

Woychuk said that after Bakema put Zenk in his vehicle, he told him "not to do anything" because Carter was coming. Zenk was kept in Woychuk's vehicle for at least 40 minutes before Woychuk was directed by Bakema to take him to Carter. Although there was a suggestion that Bakema intended to have Carter come to the scene of the accident and take over the investigation, Bakema never called out Carter. Zenk, who was being detained, had never been cautioned or given his Charter rights by Bakema when he was put in Woychuk's vehicle. Even Woychuk, an inexperienced officer, was concerned that Zenk had not been cautioned or advised of his Charter rights. If Woychuk was concerned, then Bakema, an experienced officer, must have realized that the failure to do so would affect the success of any prosecution. It is likely that this was the reason that Bakema told Woychuk to record in his duty notes that he transported Zenk to the ESPPD to complete a Traffic Accident Report.

Although Bakema claimed that he turned the matter over to Carter to avoid the perception of conflict, his continued involvement in the investigation indicates that his motives were not necessarily principled. He was not content to let Carter take over the investigation, even though he had purportedly washed his hands of the matter. He took possession of notes made by Cst. Krawchuk, an ESPPD officer in charge of traffic at the scene of the accident. These notes were never found. He asked that the Winnipeg Police Service Professional Standards Unit to question the officers who had been drinking with Zenk the night of the accident. He interviewed Beattie, Bukowski and Rosser. He made a list of the potential witnesses for trial. If he felt that he should not have been involved in the investigation, why did he not simply tell Carter it was his investigation and stay clear of it? While apparently, he did not want the responsibility for the investigation, it is clear that he wanted to ensure that he was able maintain some control over it.

Bakema said that he was hired by the Municipality of East St. Paul as a figurehead. Carter, he said, had wanted his job and liked to control things. There was obviously some unexplained friction between them. What is clear is that Bakema did not have the necessary qualities of leadership that a police chief should possess. However, in accepting the position as Chief of the ESPPD, he had accepted the responsibility of exercising leadership over that police service.

Upon arriving at the accident scene, it must have been obvious to him, from looking at the accident scene, that it was a very serious accident in which there may have been motorists seriously injured and that there was need for an extensive and professional investigation. As Chief of ESPPD, it was his responsibility to give directions to his officers to ensure that the accident was properly investigated. It is clear that he failed in his responsibilities. Even the most inexperienced investigator looking at the location of the three vehicles on the roadway and damage to the vehicles would have immediately realized that it was the pickup truck that was the cause of the collision and that the driver of that vehicle should be questioned.

Bakema admitted that Woychuk was given no task and sat in his vehicle watching traffic. Pedersen was up at the north end of Highway 59 directing traffic. No officer was ever assigned to take photographs of the accident scene. Fortunately, photographs were taken by the RCMP. Bakema did not even know who took the photographs.

> Q. Do you know how these photos were taken, who took them? Do you have any idea, sir?
> A. I don't recall.

> Q. Because they did come to us in the Crown disclosure package. But we have searched high and low, and there is no notation of anybody taking photographs in any documents, sir. Did you assign anyone to take photographs of the scene, sir?
> A. No, I did not.
> Q. It would have been something that was prudent to do? Will you agree with me, sir, that was something that was prudent to do?
> A. Yes.
> Q. Part of a good investigation?
> A. Yes, sir.
> Q. You were unaware that that had taken place?
> A. I don't recall.
> Evidence, p. 3254, l. 7-25

Bakema was asked if he had "a targeted plan for identifying and interviewing witnesses who were on the scene." He replied:

> A. Well, I just – I spoke to a witness myself.
> Q. Yes?
> A. I didn't set up a plan for that yet.
> Evidence, p. 3219, l. 9-12

I am also satisfied that Bakema and Graham collaborated in preparing their notes, although they denied it. There were too many similarities that could not be attributed to mere coincidence. For example, Bakema wrote in his duty book that at 7:32 a.m.:

> "East St. Paul First Responders attended the scene. They attend to the yellow Sprint."

With respect to the same matter, Graham wrote:

> "At 7:23 East Paul Police Fire and First Responders arrive and attend to yellow Sprint."

Bakema also wrote in his duty book:

> "7:39 Winnipeg Fire Paramedic Service departs for Concordia Hospital with driver of vehicle number two."

With respect to the same matter, Graham wrote:

> "Winnipeg and Paramedic Service depart to Concordia Hospital with driver of vehicle number two, 7:39."

Moreover, both Bakema and Graham misspelled the name of the RCMP analyst as Chris *Landford*, when, in fact, his name was Chris *Blandford*. Pedersen and Maloney testified that it was a common practice for Bakema and Graham to collaborate in preparing their notes. I am satisfied that Bakema and Graham prepared their notes together in this investigation to paint a misleading picture of an uneventful investigation.

I am satisfied that Bakema not only falsified his own notes and reports to create a false impression of his own actions, he also prompted Woychuk to falsify his notes. I am also satisfied that Bakema told Woychuk what to put in his notes to explain the lengthy delay between the time Zenk was put in Woychuk's vehicle until he was turned over to Carter. I am also satisfied that Bakema told Woychuk not to record what he had said about Zenk's condition (that he was pissed or impaired or possibly impaired) or what Rosser, the ambulance attendant said. I am also satisfied that he told Woychuk to put in his notes that the reason he took Zenk to the station was to fill out a TAR, when the real reason was in fact to get Zenk away from the scene, as he told Cecil Sveinson. Although Woychuk could not recall it, it is likely that Bakema prompted Woychuk to put the 7:42 time in his notes, which was probably false. It defies coincidence that they would both have independently arrived at this same, erroneous time.

What was Bakema's motive? Was it to leave Zenk in Woychuk's vehicle in order to sober up? Was his failure to caution Zenk or advise him of his Charter rights an attempt to obstruct the investigation? Paragraph 3 of the Order in Council prevents me from expressing any conclusion or recommendation about the civil or criminal liability of any person or organization. What is clear is that Bakema did not act in good faith in the way he conducted the investigation. Before a police officer assumes office, he or she must swear an oath that he or she will "faithfully, diligently and impartially execute and perform the duties required...without fear, favour or affection of or toward any person." Bakema failed to honour that oath.

20. Findings of fact regarding the evidence of Kenneth Graham

Graham was not a credible witness. His answers to questions were evasive and contradictory. He said that he knew Zenk's parents in Brandon, because Zenk's mother was a school teacher, but he did not know Zenk. He also said that Woychuk told him that he knew Zenk, went to school with him and "didn't want to be known as the cop that charged a Winnipeg member" and was responsible for ruining his career. I am not convinced that he did not recognize Zenk. Graham likely recognized Zenk as someone he knew from Brandon, after he was told by Bakema that he had put a WPS officer in Woychuk's vehicle. It was also likely that he and Bakema did not want to be known as the cops who charged a Winnipeg police officer and ruined his career.

As already noted, Graham and Bakema collaborated in the preparation of their notes and Bakema directed Woychuk to put in his notes that he took Zenk to the ESPPD to do a TAR. Graham knew that this was false and that if Woychuk was called to testify, he would be perjuring himself. Woychuk said that when he was hired, he was told that he would be riding with Graham to gain experience. Graham had a duty and responsibility, as Woychuk's mentor, not to prey on his lack of experience. As Woychuk's senior officer, he knew that it was wrong for Bakema to direct Woychuk to make a false entry in his duty book. The false entry was to explain the lengthy delay between the time Zenk was put in Woychuk's vehicle until he was turned over to Carter and Graham should advised Woychuk not to do so.

Did Graham have dealings with Zenk that were never recorded or admitted? Beattie and Tara Taman said that they saw more than one police officer with Zenk. Moreover, Pedersen's evidence contradicts Graham's claim that he had gone north of the intersection to direct traffic at the time Bakema was approaching Zenk. Bakema said he could not smell anything. Graham never mentioned in his notes that he could smell a strong odour of alcohol in Zenk's truck, never logged that he took Zenk's police uniform from the truck and never recorded that he had done so.

Graham's testimony was not credible for other reasons. As already noted, after Graham had testified and while Woychuk was giving his evidence, Graham approached Maloney, who had been subpoenaed to testify after Woychuk, and was sitting outside the Inquiry room. He said to him: "Maloney, Maloney, you guys are nothing but a bunch of fucking traitors." After Maloney testified, and repeated what Graham had said to him, Graham asked for permission to respond and did so from the back of the Inquiry room. He denied that he told Maloney the words reported. He was offered the opportunity to enter the witness stand and make his denial under oath, but did not accept the offer. His reference to "traitors" in the plural was warning to any ESPPD officer who dared to break a code of silence expected of brother police officers and who might give evidence that would be harmful to other officers. It was an attempt to derail the work of this Inquiry, when its mandate is to determine why the investigation of the accident failed and what role, if any, Bakema, Graham, Woychuk and Carter had played in that investigation. His outburst to Maloney can only be interpreted as an attempt to silence the truth.

21. Findings of fact regarding the evidence of Jason Woychuk

Woychuk's evidence was unsatisfactory and often evasive. He did not have any independent recollection of many of the events that took place on his watch that morning. Many of his responses to counsel were: "I don't recall." or "I guess." or "I believe." He was prepared to agree with almost every suggestion put to him by counsel that something "might be true." His answers were obviously due to the fact that his notes were sparse and that he was attempting to recall events that had happened over three years ago. Yet, Woychuk had been interviewed twice by the RCMP who were conducting an investigation into the conduct of Bakema and he had given sworn testimony when questioned by Mr. Clifford, prior to the Inquiry.

Woychuk was not credible when he said that he did not recognize Zenk and only recognized him a day or two later. Although Woychuk had also gone to the same high school as Zenk and said he knew of him, he said that he did not know him personally and did not recognize him. However, when he asked Zenk for his driver's licence and Zenk produced it, the licence was in the name of "HARVEYMORDENZENK DG". Woychuk's duty notes indicate that he wrote down "DEREK GRANT HARVEYMORDENZENK." He could give no credible explanation for why he wrote down "DEREK GRANT" from his initials. He said that he might have asked Zenk for his first names but this explanation was inconsistent with his testimony that Zenk was basically silent while in the vehicle. Maloney, however, said that Woychuk told him he knew Zenk from Brandon. It is unfortunate that Woychuk was not prepared to admit that he knew Zenk. It was Bakema who had dumped the responsibility for Zenk on him. His evidence would have been more credible if he had simply acknowledged the truth, and that he was upset because he had been made the scapegoat by Bakema.

Woychuk was in error when he said that Zenk was placed in his vehicle at 7:42 a.m. As already indicated, a letter from Interlake Regional Health Authority, dated June 12, 2006, indicates that the call for paramedics was received at 7:17 a.m., Fontaine and Rosser were enroute at 7:20 a.m., they arrived at 7:38 a.m. and departed in their vehicle at 7:56 a.m. Fontaine and Rosser said that they proceeded to Woychuk's vehicle within a minute of arrival and attended to Zenk. I am satisfied that Bakema placed Zenk in the vehicle before 7:38 a.m. This meant that there was a much longer gap than 40 minutes between the time Zenk was placed in Woychuk's vehicle and the time he was taken to the ESPPD.

Woychuk wrote in his narrative (but not in his notes) that the purpose in transporting Zenk was to process a TAR. I have difficulty accepting his evidence on this point. Woychuk had been told by Rosser that he had detected the smell of alcohol in the cruiser. Zenk was not injured and needed no medical attention. There was no reason to keep him in the back of the cruiser if there was no evidence of impairment. If there was no reason to detain him, then he should have been released. There was no urgency to have Zenk complete a TAR. Moreover, Woychuk had completed a Prisoner's Log in his own handwriting and had put an "X" beside a box indicating that Zenk was intoxicated. I have no hesitation in concluding that Woychuk was aware that Zenk was impaired after Zenk was put in his vehicle. Although Woychuk's notes indicate that Carter met him at the rear door, that notation is false. He arrived at the station and left Zenk in the locked vehicle while he went into the station and spoke to Carter.

22. Findings of fact regarding the evidence of Norman Carter

Carter's evidence was essentially credible, although his investigation was fatally flawed in many respects. For example, he admitted that Woychuk had given him few details about the accident when he arrived at his office.

> Q. At this point had Jason Woychuk given you any details about the accident?
> A. Other than it was a fatality.
> Q. Were there any details with respect to the number of cars involved, how it was that the individual he had with him factored into the accident?
> A. No, I didn't get those details at that point of time.
> Evidence, p. 2671, l. 9-17

Notwithstanding the lack of details, Carter said that he made a demand upon Zenk for a breath sample. Yet, that demand could not be made unless he had reasonable and probable grounds to believe that Zenk had committed the offence of impaired driving within the preceding three hours.

Carter's investigation was flawed because he had recorded on three occasions that he had made a "blood" demand instead of a "breath" demand in his incident narrative. Although he was the file reader, he obviously he did not read what he had put into computer even though it was the reader's responsibility to correct errors in the incident narrative. He did not discover that he had made an error in his notes until after March 10 when he advised Minuk about the error in using the word "blood" instead of "breath" in his notes and narrative report.

It was flawed because he was asked by Minuk on three occasions to apply to a justice of the peace for a search warrant to seize the sales records from Branigan's of the amount of alcohol consumed the night before and the morning of the accident. His excuse was inexplicable. If he had any concern about whether a justice of the peace would deny his application for a search warrant, the proper course would have been to contact Minuk and receive his advice on how to proceed with his application. It was inexcusable on his part simply to ignore Minuk's instructions.

Beattie was also a victim of the accident and was injured. Carter had a duty and the responsibility to investigate her injuries and to lay a charge of dangerous driving causing bodily harm against Zenk in connection with the injuries she received, if he considered the charge to be appropriate. He did nothing.

The criticism leveled at his role in the investigation has been justified. However, I can find nothing in his conduct in the investigation that deserves censure.

23. Findings of fact regarding the evidence of Glenda Pedersen

Pedersen was a credible witness but failed to make a note that she detected an odour of alcohol coming from Zenk when she fingerprinted and photographed him. This demonstrated a lack of training in note-making notwithstanding her 12 years experience as a police officer. However, I find nothing in her conduct in the investigation that deserves censure.

24. Findings of fact regarding the quality of the investigation by the East St. Paul Police Department

It is clear that the investigation of the accident, conducted by the East St. Paul Police Department, was flawed to such an extent that a successful prosecution of Zenk was rendered fatal from the time that Bakema and Graham arrived at the scene. I have outlined my reasons why it failed in my findings above. I can only adopt the conclusions of Lobsinger who said that there were major investigative errors 'that would eventually have proven fatal to all or most of the charges that were placed before the court."

25. Recommendations

Commission counsel suggested that two recommendations be made to the Minister of Justice:

i.) that there be such further investigation of the conduct of Harry Bakema, Ken Graham, Jason Woychuk, and/or Norm Carter, as the Attorney General of Manitoba may consider advisable

ii.) that there be further investigation into the investigative training available to, and the qualifications required of, East St. Paul police officers

Dealing with the first recommendation, I have already outlined my concerns regarding the conduct of Bakema, Graham, Woychuk and Carter during the investigation of the fatal accident that took the life of Crystal Taman on February 25, 2005.

Bakema lacked the necessary qualities to be the Chief of East St. Paul Police Department and should never have been appointed to that office with the responsibilities that such an office entails. Both Bakema and Graham failed to understand that their duty was first and foremost to the public of whom they were servants. It was not to other police officers. Police officers, like other public servants, are not entitled to the public's trust because of their position. Trust is something that must be earned. Both Bakema and Graham not only failed to earn the trust placed in them by the residents of East St. Paul, they betrayed it. I would recommend that there be a further investigation into the conduct of Harry Bakema and Kenneth Graham, as the Attorney General may consider advisable.

Woychuk was a tragic figure in the Zenk investigation. He had been a constable with the ESPPD for only four months, and his training and experience were limited. He was entitled to expect that Bakema, his Chief Constable and Graham, a senior officer would treat him honorably and with respect. He should not have been used as a "scapegoat" because they were not prepared to assume their responsibilities and honour their oath of office. Woychuk had taken the oath when he assumed office as a police constable and knew that it wrong to fabricate his notes. Fortunately, his conscience bothered him and he had the courage to admit to Carter what he had done. As a brand-new officer, he had never received proper on-the-job training and Bakema had placed him in an impossible position. He does not warrant any further censure.

I would not make the same recommendation with respect to Norman Carter and Glenda Pedersen.

Turning now to the second recommendation, Mr. McDonald, counsel for the Municipality of East St. Paul, submitted that such recommendation is not necessary in view of the *Management Review Report* of the East St. Paul Police Service, dated December 21, 2007 conducted by the RCMP. That report was commissioned by the Province of Manitoba. The objective of the management review was to assess the adequacy and effectiveness of the unit's management, investigative performance, and/or service delivery performance. Included in that review was an examination of the mandatory training required of members of the force. Mr. McDonald submitted that, since there had already been a training review, it would be redundant to recommend a second one.

What is significant in that report is that on page 6 under heading 8 - Training (Initial Requirements & Ongoing), the review committee has indicated an NI which means "Needs Improvement." The report says this means: "The unit practices and controls are not adequate to ensure the unit's objectives are achieved effectively."

There are a number of other matters that should be of great concern. One is referred to on page 17 of the report under heading 16 - Feedback from Crown Attorneys. In the second paragraph is the following concern:

> "There have been instances of solid work but there are concerns relating to the *quality of notes, court attendances and courtroom presentation.*"

That concern is exacerbated by a comment made by Carter on page 12 under heading 8 - Mandatory Training:

> "In the interview with Chief Carter he indicated that as he plans for training he has to consider that some of his officers may only remain with the Police Service for a relatively short period of time and then move on to other Police Services. The potential to lose someone who has recently received training can be perceived as a significant loss to the Police Service and not an effective use of training funds."

That view, in my respectful opinion, is very short sighted. It is an abdication by Carter of his responsibilities to the residents of East St. Paul. It is a statement that the residents are entitled only to second-class untrained police officers because first class trained ones will probably leave the force. The residents of East St. Paul are entitled to a better police service than that.

It is clear from the evidence that this investigation was conducted incompetently by all five officers Bakema, Graham, Woychuk, Carter and Pedersen. As Sergeant Paul Lobsinger noted in his opinion: "There were major investigative errors that would eventually have proven fatal to all or most of the charges that were place before the court." And further, there were: "So many investigative errors in this investigation the table could not have been tilted more in favour of an accused person if they had been pre-ordered."

On February 25, 2005, four officers of the ESPPD were dispatched to the scene of a fatal accident and conducted what can only be described as an incompetent investigation. It failed for many reasons: lack of leadership by the Chief Bakema; lack of basic understanding of the requirements of the Charter of Rights and Freedoms; lack of basic understanding of the provisions of section 255 of the Criminal Code; and lack of basic understanding of simple note-making. There was, to use the evidence of Graham, "chaos" everywhere.

It is of significance that, the ESPPD has a *Manual of Policy and Procedure Guidelines* dated March 22, 1995. It sets out what steps a member of the department should follow, where a member determines through investigation/observation that a person has committed an offence under section 253 of the Criminal Code. However, few of the members have ever read it. Although the manual should be updated on the law, it is very informative, comprehensive and instructive. It should be obligatory for every member of the ESPPD to read and study it regularly. Ironically, as of the date of the accident, there was and still is no requirement that members of the ESPPD read and study it as a condition of their employment. It has a signature sheet that is signed by officers who have read the policies and procedures.

A review of the signature page indicates that since 2001, it is hardly ever read. The signatures indicate that Graham was the only officer who read it on one occasion – a year prior to the accident – and on two occasions after the accident. Although Woychuk indicated by his signature that he read the manual, his signature is not dated. The signature sheet indicates that the manual was read by Woychuk 10 months after the accident and again in April, 2006. The sheet also indicates that it was read by Pedersen in May 2006 and August 2006 for Domestic Pursuits. There is no indication that the manual was ever read by Bakema or Carter. There is no doubt that had all of the officers who were involved in this investigation read and studied the manual carefully, there would not have been so many investigative errors committed.

Accordingly, I recommend to the Minister that there should be further investigation into the investigative training available to, and the qualifications required of, East St. Paul police officers.

PART B
THE INVESTIGATION
BY THE PROFESSIONAL STANDARDS UNIT

1. The party at Branigan's on the evening of February 24 and morning of February 25

Branigan's was a restaurant located on Leila Street in the north end of Winnipeg. The general manager of Branigan's at the time was Rodrigo Bravo (Bravo). Bravo felt that it was good business for his restaurant to encourage the patronage of police officers and went out of his way to do so. Bravo said that he was and still is a close friend of two of the officers, Black and Cst Norbert Bauer, both working out of Divisions 13. Police officers were offered chicken wings for 35 cents and draft beer for $2.75 at any time even though other patrons were not given the same offer except on Thursdays and Saturdays.

Officers from District 3 of Division 13 met there after their evening shift on a monthly basis for wings and beer, and often went to Branigan's in the evening for dinner with their wives and girl friends. If a large number of officers were going to Branigan's after their shift, they usually made a call to alert the staff that they were coming and tables were set up in a row so that the officers could sit together. The lounge where the officers had their tables set up that evening was small and enabled them to have conversation with one another.

On February 24, Cst. Dave Harding (Harding), another police officer working out of Division 13, called Branigan's to advise that a large group of officers would be arriving after the 11:00 p.m. shift. Although Branigan's usually closes on a regular night between midnight and 12:30 a.m., on those evenings when the officers arrive, it stays open and serves drink and food until 2:00 p.m. On February 24 , Darcy Gerardy (Gerardy) was the evening manager on duty. Bravo had left the restaurant between 7:00 p.m. and 8:00 p.m. that evening and did not return until the following morning. When the officers arrived, there was a cook in the kitchen, Mark Beitz was the bartender and Chelsea O'Halloran (O'Halloran) was the only waitress on duty to serve the officers who were coming to Branigan's after their shift. Both the cook and Beitz left at midnight.

2. The evidence of the employees of Branigan's about the amount of alcohol consumed by Zenk and by Division 13 officers at Branigan's

O'Halloran was 21 years old at the time and had been a waitress at Branigan's for two months. She had worked as a waitress for two years at another restaurant in Winnipeg prior to her employment at Branigan's. During the two months that she worked at Branigan's, she said that she got to know three Winnipeg Police Service officers working out of Division 13. They were Black, Ken Azaransky (Azaransky) and an officer name Dave (who is probably David Harding), all of whom regularly frequented Branigan's.

She said that on one occasion, she had stayed after her shift and had a drink with the three of them. She said that on the evening of February 24, 2005, those three officers came into Branigan's after their 11:00 p.m. shift was over with 20 to 25 other officers. She said that there were at least two female officers that she recalled, but there could have been three, and some younger officers. She said that they all seemed ready to have a good time.

O'Halloran said that sales were extremely busy that night and she did not have time for a break. The officers were drinking mainly beer although some had liquor. Some had ordered chicken wings. Branigan's' Online Detail Sales Report for February 25, 2005 indicate that there were sales of 130 pints of beer during her shift, including $2.75 pints and 61 drinks of liquor, including 19 free drinks. O'Halloran said that the officers were also given some free pitchers of beer. O'Halloran believed that most of the beer and liquor was consumed by the police officers.

O'Halloran testified that as the evening progressed, the officers became louder and louder, and some of them began making rude and obnoxious comments. One female officer stood up on one of the stools and clapped her hands and laughed loudly. She said that the three officers that she knew (Black, Azaransky and Harding) were drunk and made rude remarks about her body. During the time they were at the restaurant, she formed the opinion that some of the other officers had become drunk. This assessment was on the basis that when the officers come into the restaurant, they are usually quiet. However, if they have been drinking too much, they become rude, loud and obnoxious as they did that evening. She said that as a waitress, one learns to detect when people have had too much to drink. O'Halloran said that one of the officers, whom she believed was Zenk, had eight or nine pints of draft beer that evening. She said that Zenk was known for eating chicken wings. However, when she was interviewed by the Professional Standards Unit (PSU) of the WPS on March 11, 2005, she was shown a series of photographs that included one of Zenk and was unable to identify him. She believed that Zenk and his wife, whom she said was pregnant, had dined at Branigan's at a Super Bowl party a short time before. There was later testimony that the police officer who O'Halloran believed was at the Super Bowl party with his pregnant wife was another officer.

O'Halloran was interviewed by the PSU on March 11, 2005. She told this Inquiry that she had minimized the amount of alcohol consumed by the officers that evening because she had been told by Bravo to play dumb; to answer "yes" or "no," and not to say very much. She was told to pretend not to remember too much that night. Bravo told her he wanted to protect the officers and was concerned about his civil liability. He also warned her about her own potential liability for serving intoxicated patrons. She knew that when she gave those answers, they were false. However, she said that she did not feel good about what she had done and felt that it was better to tell the truth. Under cross examination by counsel, she stood her ground with respect to her testimony.

Gerardy was the night manager on duty at Branigan's that evening. Although he was less critical of the officers that evening, he agreed that the waitress serving the drinks is in a much better position to assess the condition of the patrons than the manager who is not serving drinks and not on the front line. Nevertheless, he too was concerned with the condition of some of the officers as they lined up to pay their bill and left the premises. He spoke to a number of officers whom he felt should not be driving a motor vehicle, asking whether they wanted a ride home, and was told by other officers that they would give them a ride.

3. The evidence of the Winnipeg Police Service officers who attended Branigan's

Black has been a police officer with the WPS for 14 years and now holds the rank of sergeant. Although he and Bravo were good friends in February 2005 and spoke by telephone almost every day, they have not spent much time together since Bravo moved to Edmonton, Alberta. Black said that he and his partner Azaransky arrived at Branigan's between 11:30 p.m. and 11:45 p.m. When they arrived, the tables that had been set up were full of officers. He and Azaransky did not sit with the group already there but sat in a love seat at a round table close to the fireplace. Branigan's had at the time and still has high-top and low-top round tables for its patrons. Black said that he and Azaransky sat at a low-top table and were joined by Cst. Jay Nolet (Nolet), who was Zenk's partner, Sgt. Jim Anderson (Anderson) and Sgt Chris Humniski (Humniski).

Black told this Inquiry that he had about four drinks of beer and recalled that his bill for wings and beer came to $33. He also gave a statement to his insurance adjuster on March 5, that he had 25 wings and four bottles of beer, either Keith's or MGD, and that his bill was around $33. He was interviewed by the PSU on March 11, but ironically, was never asked what he had to drink a Branigan's.

Black said that Zenk was sitting at the next table facing the window with his back to him. He said that he was unable to see how much Zenk was drinking because Zenk was sitting at a high-top table, and that their low-top table is at least two feet lower. Had he simply said that he was not paying attention to what others were drinking, his answer would have been more credible. However, to insist that he did not see what Zenk was drinking because he was at a low-top table and Zenk at a high-top table casts his evidence in a suspicious light, particularly when it is clear that there was not a substantial difference between the two table tops that would have prevented him from seeing what was on Zenk's table. Black's evidence was not satisfactory in many other respects. He said that he did not frequent Branigan's on more than one or two previous occasions which is odd, considering that he was a close friend of Bravo, and police officers were given $2.75 beer and 35-cent wings on any day, not just on Thursday and Saturday.

Black's partner, Azaransky, a constable with four years experience, also had difficulty remembering what each of his colleagues had to drink at Branigan's that evening and later at Black's home. He had met Zenk in 2000 through Corrections hockey. He went to Branigan's with his shift and sat with Nolet and Black at a low top table with his back to Zenk who was at one of the high top tables three to four feet away. He may have exchanged a few words with Zenk but did not have any long conversation. He drank two or three beers and ate some wings. He had no specific recollection of other officers drinking. He did not notice any change in the behaviour of his colleagues as the evening progressed and saw no one impaired, even though O'Halloran and Black had said that Harding was intoxicated. He did not hear anybody make remarks about Chelsea O'Halloran. He did not hear any concerns expressed by Gerardy about the ability of some officers to drive. He remembers lining up at the bar to pay his bill but doesn't recall how much it was.

Harding testified that he had called Branigan's that afternoon to advise them that a large number of police officers would be attending at the restaurant after their shift finished at

11:00 p.m. Harding, who had been a WPS officer for two years at the time, had met Zenk in 2003 was a frequent patron of Branigan's and usually called once a month to arrange a gathering of his co-workers. He said that he arrived at Branigan's with a number of other officers before Zenk arrived. Zenk sat down at the end of the tables, three or four tables down from him, about 12 to 14 feet away. He said that he drank four or five, $2.75 draft beers which he considered heavy consumption for him, notwithstanding that he is 6 feet tall and weighs 230 pounds. He remembered that Zenk had 40 wings but he could not recall how much Zenk had to drink. His explanation was that he been to Branigan's before and that: "it was an ongoing shift joke that Derek could eat a lot of wings." He said that he was keeping tally on the number of wings Zenk ate but was not interacting with him. He could not tell the Inquiry with what Zenk washed down his wings. He could not recall that O'Halloran was the server that evening and only learned that she was through this Inquiry. He did not recall that Gerardy was the manager that night.

Cst. Kelley McLure (McLure) had been involved in computer training that day at the Division and had gone to Branigan's around 11:00 p.m. with her husband, who is also a WPS officer. She remembered that at around midnight, she had a heated conversation with Zenk about computer problems at their Division, but could not recall whether he had any alcohol in front of him and did not know how much he was drinking.

Cst. Ted Michalik (Michalik) testified that he saw Zenk speaking with Harding, Guyot and Nolet but both Harding and Nolet denied that they spoke with Zenk. Michalik said that he left Branigan's just before everyone lined up to pay their bills. He said while he was warming up his car before driving out of the parking lot, he looked into Branigan's and saw people in the area of the cashier. He assumed that they were paying their bills and were leaving. He remembered seeing Zenk together with a group of four officers lining up to pay their bill. Although he recalled seeing Zenk at Branigan's and saw a drink on the table in front of him, he was unable to say how much Zenk had to drink. He did not go to Black's residence after he left Branigan's.

Humniski was the shift supervisor for the shift that was at Branigan's that evening. He said that he did not arrive at Branigan's until 1:00 a.m. and sat at a table with Anderson and Jack Kapka. He said he did not think that the party was as loud as O'Halloran had said because: "I'm not sure what it would be loud in comparison to. This was a lounge, it's a large room." He had two bottles of beer and wings and paid with cash. He saw Harding mingling in the lounge. He said that he did not recall anything unusual about Harding's behaviour, even though O'Halloran said that he was obnoxious and Harding said that he had four to five beers, which he admitted was heavy consumption for him. Humniski did not recall seeing Zenk that evening at Branigan's.

Anderson was a patrol sergeant on February 25, 2005 and had worked the evening shift. He left work at 12:15 a.m. and sat with his shift mates at one of the high tables at Branigan's. He did not recall who he sat with. He did not recall seeing Zenk at Branigan's. He said that he drank three beer and water, which he always drinks when he is having alcohol, and paid cash when he left.

Two other officers, Zenk's partner Nolet and Cst. Tracey Fudge (Fudge), testified that while they remembered that Zenk was at Branigan's that evening, they did not observe the amount he had to drink. Nolet told this Inquiry that Zenk had a beer in front of him. He told the PSU that Zenk did consume alcohol but didn't know how much and probably at 62 wings. Cst T.J. Spruyt (Spruyt), a new officer who was the last to testify before this Inquiry, testified that he could not even recall whether he saw anyone having a drink at Branigan's.

Twenty-three officers who had been at Branigan's that evening, including the officers above who gave evidence before this Inquiry, were interviewed by the PSU between February 28 and March 23, 2005. Fifteen officers were asked what they had to drink that evening at Branigan's. One officer indicated that he drank four beers, two officers said that they had three beers, some said that they had a few drinks and others said they had nothing to drink. Twenty-two of the 23 officers were asked what observations they made about the amount of alcohol that Zenk had to drink that evening at Branigan's. Six officers said that they saw one beer in front of Zenk and the remainder said they had no idea what he had to drink.

4. Findings of fact regarding the amount of alcohol consumed at Branigan's

Branigan's Online Detail Sales Records for February 25, 2005 indicated that the officers at Branigan's had far more to drink than they were prepared to admit. O'Halloran was a credible witness. Her evidence of the amount of alcohol consumed by the officers who attended the gathering at Branigan's was clearly supported by the sales records from Branigan's. Her evidence that some of the officers were drunk was supported by the evidence of Gerardy who expressed concern that some of the officers should not be driving. O'Halloran had everything to lose by coming forward and giving her evidence to this Inquiry, and nothing to gain. O'Halloran's evidence was also credible because it was made against her interests, in that her testimony was an admission that she had misled the PSU during her initial police interview. She explained that she disclosed this because she came to understand that the Taman family deserved to know the truth. She is to be commended for her courage in coming forward and assisting this Inquiry.

Although Bravo denied that he ever told O'Halloran to play dumb and minimize the condition of the officers, he was not a credible witness on this issue as well as others. I have no hesitation in preferring O'Halloran's evidence over his. He had a reason to tell her to minimize the amount of alcohol consumed by the officers. He was concerned that he and Branigan's could be held civilly liable for the accident. His evidence was internally and externally inconsistent with other answers he gave. For example, although 19 free liquor drinks were given away that night, he could give no explanation for it. Although the PSU asked Bravo for sales records that would indicate how much alcohol had been consumed that evening, he told PSU that head office had the records even though he had a disc of the records in his office. He also told the PSU that the records would not assist in determining the amount of alcohol consumed by the WPS members when the records, in fact, did just that. His explanation for failing to tell the PSU that the records were on a disc, that he did not think of it, was simply not credible. He was not credible when he denied telling O'Halloran that he was concerned about civil liability.

5. The party at the home of Cst. Sean Black on the morning of February 25

Black said that as the party at Branigan's progressed, he noticed that only Harding had too much to drink. He said that around 2:00 a.m., the party started to break up and he extended a general invitation to the officers to come to his home a short distance away to continue socializing. His wife and children were away. Nine officers accepted his invitation. Some who knew where he lived arrived before he did and others followed him. Harding left his vehicle at Branigan's and came in another car. On the way, Black stopped at a Seven Eleven store for mix and food items. He testified that upon arriving at his home, he put out a full 26 ounce bottle of Crown Royal rye and the heel of another bottle of rye on the kitchen counter for his guests. He said that he also put out a bottle of Bailey's. The officers were invited to serve themselves and they did. He did not pay attention to how much each was drinking. He was pre-occupied by the fact that his popcorn machine was not working and by trying to be a host so that he could get to know his shift. Black said that the officers socialized and he noticed nothing unusual. However, he told Detective Sergeant Roger Girard (Girard) of the PSU who interviewed him on March 11, 2005 that: "I do recall the girls leaving and being concerned about people driving" and that Harding was a concern.

Arrangements had been made by the PSU to interview Black, Azaransky and McLure on March 3. At the last minute, Black and Azaransky put off that interview. Only McLure attended. On March 5. Black spoke to his insurance company. He said that he did so, not because he was worried about civil liability, but because it was suggested that he do so. He was asked to give a statement to an adjuster. He gave a statement and signed it. In that statement, he said that he had 25 wings and four beers, either Keiths or MGD, and that his bill was $33. He also said that when his guests arrived at his home, he put out two bottles of rye and part of a bottle of Baileys on the kitchen counter so that they could help themselves. He told this Inquiry that he really didn't read his statement carefully before he signed it. Black told the PSU during his March 11 interview that he put out a bottle of rye and "basically a Bailey's bottle." His explanation for the difference between one and two bottles of rye to this Inquiry was that when he told his adjuster two bottles of rye, he meant one full bottle and the heel of another.

Black said that some of the officers started to leave around 5:30 a.m. and that by 6:30 a.m. only Azaransky and Zenk were left. During the evening, he asked if anyone wanted to stay over and only Azaransky said that he would stay over. Black said that he made the offer because it was late and some of the officers might be tired. He denied that it was because some of the officers were intoxicated, except for Harding who had left his vehicle at Branigan's.

Harding eventually left with three other officers. Black suggested to Zenk that he should stay over because it was late and he might be tired but Zenk refused. Black also said that Azaransky suggested that Zenk should stay over. At no time did Black feel that Zenk was intoxicated. During the evening Zenk had told Black about his ability to do home renovations and offered to do some renovations for him. Black took Zenk to the basement to show him the area that he wanted renovated. After they came upstairs, Black decided to go to the bathroom. He said that when he returned Zenk had already left. Azaransky settled in on the couch and Black went to bed and slept from 7:00 a.m. until 11:00 a.m.

Before he went to bed, he noticed that the two bottles of rye were empty and part of the bottle of Baileys.

Azaransky said that he drove to Black's residence in his own vehicle. People arrived and congregated in the kitchen where they were socializing. He guessed that he poured himself and drank a couple of drinks of rye and coke. He recalled noticing some behavioural changes in Harding at Black's residence. He had no recollection of any conversation with Zenk or whether Zenk was drinking. He had accepted Black's invitation to stay over and was getting the couch ready to go to sleep when Zenk and Black went to the basement. Azaransky said that he did not suggest to Zenk that he should stay over, but only asked Zenk if was staying over and was told by Zenk that he was not. When Black and Zenk came upstairs, he was lying down on the couch. Black went into his bedroom and upon returning, asked where Zenk was. He told Black that he did not know as he did not see him leave.

Azaransky learned about the fatal accident from Humniski who told about it the next day at a function for a retiring officer. He became concerned about his career and discussed the matter with Black. They decided not go to their PSU interview on March 3. Anderson called Girard of the PSU who was in charge of the interviews and told him. Girard wrote down in his notes that the reason cited by Anderson was that they wished to consult with the Winnipeg Police Association because "they are concerned re: future impact statements may have on civil litigation and/or WPA Regulation material in this incident". Azaransky said that he attended the PSU interview on March 11 after being advised by his association representative that he was required to give a statement. Azaransky recalled attending a Super Bowl party at Branigan's before the fatal accident with another officer Cst. Christian Guyot and his wife, Harding and their girl friends. Zenk and his wife were not at that party. He remembered that one of the girlfriends was pregnant. He did not recall having a drink with O'Halloran previous to the accident.

Harding said that he saw a bottle of Rye on the kitchen counter and was drinking Rye and coke. He recalled others having alcohol to drink but he did not notice what Zenk had to drink at Black's residence. He said that he did not speak to Zenk and was intoxicated. Black offered him a place to stay for the night and he went down to the basement to sleep. However, a group of officers woke him up and gave him the option to go home if he wanted. He decided to go. He was driven home by Anderson and picked up his automobile the following day from Branigan's. Asked by Girard at his PSU interview whether there was anybody that was *obviously* intoxicated or loud, his reply was: "No. Because to be honest, I was probably the most intoxicated there." This answer suggests that there were others intoxicated but that he was the *most intoxicated*.

Fudge attended the party at Branigan's and later at Black's residence. She said that after she left Branigan's, she drove McLure , Harding and Anderson to the Black residence. She was unable to say how much had to Zenk drink that evening but she did not feel that he was impaired. However, she formed the opinion that Harding was impaired at Black's residence. When she left Black's residence, she drove McLure, Anderson and Harding back to Branigan's. She said that Harding wanted to drive home and she had to wrestle his keys from him because he was in no condition to drive. Harding said that he had no recollection of Fudge wrestling him for his keys.

Anderson said that he got a ride with Fudge to Black's residence after he left Branigan's around 3:00 p.m. At Black's, he drank no more than three glasses of rye and water. Anderson said that he did not make notes of what had happened that evening for two reasons. The first was that he intended to give a statement to the PSU, which he did on March 2. The second is that he understood that a witness, whether a policeman or a lay witness, is not entitled to refer to notes when giving testimony unless those notes were made at the time or shortly after the event.

Humniski said that he had two drinks of Rye and coke at Black's residence. He left Black's residence between 3:30 a.m. and 4:00 a.m. At Branigan's he had two bottles of beer. He said when he left Black's residence, he felt fit to drive home. He said that he did not see what Zenk was drinking.

McLure left Branigan's and went to Black's residence with Harding and Anderson in Fudge's vehicle. She recalled that at Black's residence she was in the kitchen at the end of a counter with her partner Spruyt on one side and Anderson on the other. She poured herself a drink of Bailey's with milk. Zenk was at the end of the counter. She had no recollection of speaking to him or seeing what he was drinking. The only person that she felt was intoxicated that evening was Harding. When Fudge drove her, Harding and Anderson back to Branigan's after leaving Black's residence, she told Harding bluntly that he was not driving. She had no recollection of seeing Fudge wrestle with him for his keys.

Nolet and Spryut went to Black's home after the party in their own vehicles. Nolet told the PSU that he did not how much Zenk had to drink as he was not paying attention. Zenk told this Inquiry that Zenk was consuming alcohol but did not show any signs of impairment. He told the PSU that Black put all the alcohol away at 4:00 a.m., "so there wasn't any alcohol around" and he did not "recall Derek having a drink in his hand after that." Black said that the bottle of rye was empty when he cleaned up at 6:30 a.m. Nolet told the Inquiry that he was still there at 6:23 a.m. when he got a telephone call from his girl friend. He said that he only had one drink from 2:45 a.m. to 6:23a.m. Spruyt was able to recall very little about the evening at Black's home. The only officer who saw Zenk drinking was Nolet but he was unable to say how much.

6. Findings of fact regarding the amount of alcohol consumed at Black's residence

Black's reason for speaking to his insurer was not credible. Clearly, the only reason why he wanted to speak to his insurance company before he was interviewed by the PSU was because he was concerned that he could be found civilly liable if he had permitted Zenk to leave his home in an impaired condition. He said that the adjuster asked him questions and wrote down what he told him and prepared a statement which he signed a few days later. He suggested in his testimony that the statement was not entirely accurate, although he admitted reading it before he signed it. Again, I find this answer not credible. Why would he sign a statement for his insurer unless it was accurate? That Black was concerned about civil liability is borne out by his statement to his insurance adjuster that Fudge and McLure "also offered to volunteer as designated drivers" and his statement to the PSU that "I do recall the girls leaving and being concerned about people driving."

Black told his insurance adjuster that: "No one was consuming liquor at a heavy rate". He testified that he meant consuming liquor "at my residence." Yet, when asked by Commission counsel what each of his nine guests were drinking, he said that he had no idea. He said that he could only assume that everyone was drinking because: "The liquor bottle was empty by the morning." Black was asked on three occasions how much liquor he put out for his guests and gave three different answers. Shortly after the accident, he told his insurance adjuster that he put out two bottles of rye and part of a bottle of Baileys for his guests at his home. Later, he told the PSU that he put out a bottle of rye and "basically a Bailey's bottle" and that the bottle of rye was consumed when he noticed it the next day. He told this Inquiry that he put out a bottle of rye and a heel of another bottle and a bottle of Bailey's, from which McLure admitted having something to drink. Fudge said that she had nothing to drink at Black's residence. While it is more likely that Black's original statement to his insurer was more accurate, since he was concerned about his civil liability, what I consider significant is that the eight officers who were drinking finished more than 26 ounces of the liquor in a few hours after they had been drinking earlier at Branigan's. In my view, some of them should not have been driving home.

With the exception of Nolet who said that he saw Zenk drinking alcohol but was unable to say how much, none of the officers had any recollection of whether Zenk had any alcohol to drink. I find it difficult to accept that 10 officers in close proximity to one another in Black's kitchen for a couple of hours would be unable to say whether Zenk had too much to drink or were unable able to comment on Zenk's condition to drive home after leaving Black's residence. If they were unable to do so, the reason probably lies in the fact the officers had a great deal more to drink at Black's residence than they were prepared to admit. It is supported by the comment made by Harding to Girard that he was "probably the most intoxicated there."

Finally, this conclusion is supported by the testimony of Martin Minuk, the independent prosecutor. Minuk sent a memo dated September 20, 2007 to Donald Slough the Assistant Deputy Minister of Manitoba Justice updating him on the status of the prosecution. In that memo, he reported that "Some officers themselves reported their impairment was such that they did not remember much that evening." In his evidence before this inquiry, Minuk attributed those comments to either Anderson and/or Humniski, whom he spoke with prior to July 16, the date set for the preliminary inquiry. Minuk's docket invoice to Manitoba Justice indicates that he spoke by telephone to Anderson on July 11, by telephone to Humniski on July 12 and met with Humniski on July 13. Although his evidence was challenged by counsel, he was certain that it came from one or both of those officers. I am satisfied that either Anderson or Humniski made that comment.

7. The investigation conducted by the Professional Standards Unit

When Humniski and Anderson learned of the accident and Zenk's involvement in it, they knew that there would be a police investigation. They decided to contact their superior, Inspector Keith McCaskill (McCaskill) at WPS to tell their story and help in the investigation. They said that they wanted to clear up any rumours that were "hatching" about the events of the previous evening. One of them told McCaskill that "it was a subdued gathering." McCaskill suggested that they see Superintendent Art Stannard and tell him what had happened.

The Professional Standards Unit is a separate branch of the Winnipeg Police Service. Members of the Unit are senior members of the WPS who asked to serve on the Unit for a specified period of time. They have two investigative roles. The first and most important is the investigation of members of the WPS who are alleged to have breached a regulation of the service. The second role is the investigation of criminal offences allegedly committed by a member of the WPS.

The investigation of a regulatory complaint or a criminal offence is instituted by a 24hour notice to the member to appear for questioning by an investigator with the PSU. The members must be interviewed during one of their shifts. They are required to attend and answer the questions put to them. They are also entitled to consult with their Union representative and counsel before they are interviewed. The PSU at the time was located in offices on the 10th floor of the Confederation Building in Winnipeg, separate and apart from the main police service.

Inspector Jim Poole (Poole) was a staff sergeant and acting inspector with the PSU in February 25, 2005 overseeing investigations by the PSU. He testified that on the morning of the accident, he was having coffee in a restaurant across from the Public Safety Building between 8:00 a.m. and 9:00 a.m. when he received a telephone call from Superintendent Corrine Scott advising him that a WPS member had been involved in an accident, was and was in custody. Reading from notes he made that morning, Scott said that he went back to his office and made a call to receive more details of the accident but does not remember whom he called. He said that at 10:55 a.m., he received a called from Carter advising that he spoke to Minuk, the special prosecutor and that Zenk had been released on a Promise to Appear. (He may have been wrong in his time because Zenk was not released on until 1:03 p.m.). At 12:10 p.m., he called Sgt Paul Isaak (Isaak), the wellness officer about Zenk and then met with Scott and Steve West the manager of administrative and strategic issues. He then called and briefed Acting Chief Menno Zacharias.

On Monday, February 28, Poole called and spoke to Bakema at 7:32 a.m. Even though Zenk's name was not disclosed, Bakema was upset that the media had revealed that the driver of the vehicle that had caused the accident was a police officer. He asked Bakema for the package containing ESPPD's accident report and some witness statements and was advised that it would be ready within an hour. The package was picked up by Girard, a member of his Unit. Poole said that he received a call from Scott and then a confirming e-mail instructing him to investigate "to determine where Harvey-Zenk was coming from and who he might have been with prior to the MVC." Poole said that he understood that the investigation was restricted to a possible breach of the regulations, and was not a criminal investigation. He was made aware that it was necessary to keep Bakema informed of what the PSU was doing just in case their investigation might overlap into criminal activity that may have been committed by the WPS members. The possibility of an overlapping criminal investigation was evident in the way the request was made.

At 11:20 a.m., Poole assigned the file to Girard. Girard said that he was told by Poole that they were to assist the ESSPD in the investigation and was given the ESSPD report of the accident. He and his partner, Sgt. Con Pearson (Pearson) were asked to attend at District 3 station to secure Zenk's service pistol as there was some concern expressed by Isaak, the wellness officer, as to Zenk's wellbeing. They attended, met with Inspector McCaskill and secured the weapon. They went to the ESPPD station, spoke to Bakema and received an incident report from him and Zenk's uniform. Bakema told him that he had seized the uniform because he did not want it to be found later when Zenk's vehicle was towed away.

On Tuesday, March 1, Poole received a call from Superintendent Art Stannard at 4:20 p.m. advising him that Humniski and Anderson were in his office with McCaskill. He said that Humniski and Anderson were anxious to be interviewed because of media attention to the accident. They wanted to give their version of the events as soon as possible. Poole was also told that Scott spoke with Bakema who said that he had no manpower to interview the WPS members and "speaking to them also falls under the ambit of the newly authorized PSU investigation." At 4.25 p.m., Poole advised Girard that Humniski and Anderson were coming in very shortly and wanted to make a statement. He then called Minuk to advise him that the PSU was now involved in the investigation. Poole said that although Humniski and Anderson had an interest in advancing their version of the events, because it might affect their careers, he presumed that the officers would be telling the truth as he would assume about any ordinary member of the public he interviewed.

At 4:30 p.m., Anderson and Humniski appeared at the PSU offices indicating that they wished to be interviewed and were interviewed by Girard and Pearson. They also advised Girard that Black and Azaransky wanted to postpone their interviews because they wanted to consult with the Winnipeg Police Association. Girard wrote in his notes that Black and Azaransky were "concerned about the future impact that their statements may have on civil litigation and/or Winnipeg Police Service regulations regarding this." He was surprised by this information because he had received information that McLure was coming down to be interviewed with Black and Azaransky that evening. Girard advised Poole of what Anderson and Humniski had said in their interview.

At 8:00 a.m. the next morning, Poole spoke to Minuk and advised him what the PSU had learned about the party that had taken place. At 4:15 p.m., a formal request was received from Bakema on behalf of the ESPPD for the PSU to conduct a criminal investigation. Girard said that this was the first time he had participated in a criminal investigation that focused on a member of the WPS. He and Pearson then arranged interviews with the officers who were at Branigan's and with the officers who were at Black's home the evening before the accident. He said that he did not interview Zenk because he understood that the ESPPD would be doing that investigation and there had been no specific request to interview him. He agreed that although drinking and driving is considered discreditable conduct within the meaning of the rules and regulations, Zenk was not interviewed.

On March 7, Girard called Humniski and said that he would like to interview Black and Azaransky the following day. It was not until March 11 that there was an opportunity to interview them. At the end of the interview, Black asked a question:

> "…and this is something outside of the matter here, but like I'm being kind of brought here as a police witness or as a witness."

Azaransky asked a similar question:

> "I just have a question about, I guess, my attendance. I guess, am I here as a police officer governed by rules and regulations to assist the PSU in an investigation?"

Girard said the questions by Black and Azaransky did not trigger any concerns on his part about whether their evidence would be forthcoming.

In his interview with Girard, Black told him that the officers consumed a bottle of rye and a bottle of Bailey's. As noted earlier, in his evidence at this inquiry, Black said that the officers had consumed one bottle of rye, a heel of a bottle of rye and some Bailey's. Black did not give Girard a copy of the insurance adjuster's statement that he had signed that morning. In it, Black said that approximately two bottles of rye and some Bailey's were consumed at his residence that evening. Girard agreed that had he known about the statement, he might have twigged to the fact that the answers given by Black were not precise or complete as expected, and he might not have assumed that police officers always tell the truth.

Between February 28, 2005 and March 23, 2005, the PSU interviewed 25 members of the WPS. Twenty-three of the members interviewed had been at Branigan's and nine had attended at Black's residence prior to the accident. None of the WPS members interviewed were able to provide any assistance to PSU in determining how much Zenk had to drink that evening or whether his ability to drive a motor vehicle was impaired by alcohol.

Upon completion of the interviews, Girard prepared a report and delivered it to Minuk on March 23, 2005. Although the responsibility for the investigation of the fatal accident was that of the ESPPD, Poole did not give the report to the ESPPD until May 6, 2005, six weeks later.

8. Findings of fact regarding the quality of the investigation by the Professional Standards Unit

I am of the view that the investigation conducted by the PSU was doomed to failure from the very beginning. The manner in which the interviews were conducted was bound to leave the impression that the investigation of the WPS officers at Branigan's and later at Black's residence, was not being pursued with the kind of vigour and expertise expected of the police when interviewing a civilian witness who may have witnessed criminal conduct. In making that comment, I make no criticism of the integrity or competence of the officers who conducted their interviews. Girard was forthright in his evidence, and candidly accepted the criticisms leveled at the manner in which he and his colleagues conducted their interviews of the WPS members. He agreed with Mr. Paciocco that "There were a lot of things done in our investigation that could have been done more thoroughly, yes, in hindsight." My criticism is leveled at the constraints under which the PSU investigators were forced to operate in conducting their investigation.

Girard was of the view that when conducting an investigation, there had to be a balance in the way witnesses were questioned. He testified:

> "In Professional Standards, it has to be a balance. Because one of the things that I was told that we are not – let me just think about the right way to word this. In order – we basically had four stakeholders that we were serving, in the sense of our duties; that being the citizens of Winnipeg, the City, the service, and our members. So we had to make sure that there was a balance, that we did things the right way, to maintain credibility with all those groups. It is difficult to do the work if you don't have credibility."
> Evidence, p. 5397, l.1-12

With respect, there can be no successful investigation if an investigator is required to balance several interests when questioning witnesses. Although Girard was not prepared to accept that his investigation was "an exercise in compromise," as suggested to him by Mr. Paciocco, it is clear from his evidence that it was, in fact, "an exercise in compromise." There can be no compromise when a witness is questioned by an investigator. The goal of the investigator must be to obtain the truth. The only restriction upon the investigator is to ensure that the constitutional rights of the witnesses are not jeopardized. A successful investigator can never be a prisoner of compromise that is not imposed as a matter of law.

Moreover, there can be no successful investigation where an investigator approaches an interview of a witness with the assumption that the witness will be nothing less than truthful and will be forthcoming in the information he or she gives to the interviewer. Here, such assumption was naïve, particularly when it was known that some of the officers were anxious "to come forward and set the record straight." It was naïve when one considers that Humniski and Anderson, as supervisors of their platoon, had an interest in the outcome because it would reflect badly on them and their careers, and it would reflect badly on the members of the platoon generally. It was naïve to assume that Black would be forthcoming in his answers considering that he might be concerned about his civil liability and the implications the accident would have for him, particularly in the light of the questions Black and Azaransky posed to their interviewers at the end of their interviews.

It was also naïve considering that there had been a prior platoon briefing during which there had been a discussion of some of the questions that Anderson and Humniski expected the PSU would ask. It was not only naïve but, as Girard also admitted, strange that although the WPS members could understandably not be able to give a precise drink count, they were unable to say whether any of their associates were drinking lightly, moderately or heavily in the confined space at Branigan's or a Black's residence. Finally, it was naïve not to consider the kind of pressure that would be placed on a WPS member, by the very dynamics of being a member of a platoon, to come forward and say that he or she saw a colleague drinking heavily. Surely, the interviewers must have been a little suspicious when each WPS member interviewed gave the same story that they did not see what Zenk was drinking and everyone was perfectly sober, with the exception of Harding.

Another concern about the method of questioning police officers arose during the testimony of Girard. He said that police officers should not be pressed "too hard" when being interviewed.

> A. At the – the one thing that I found in my experience is that it's a balance on how hard you press officers in interviews. Because typically, if you press too hard, you get to a certain point, and what happens is one of three things; they either sit back and cross their arms and look at you and don't say anything else, or they repeat the same answer over and over again, and they fall into the I don't know, I don't recall.
> Evidence, p. 5463, l. 11-20

Another valid criticism leveled at the methods used was that some interviewers made comments that telegraphed the answers that the witnesses should give. For example, while questioning Black, Pearson suggested that Zenk was fatigued due to overtime even though the WPS records showed that Zenk had not worked overtime:

> Sgt. Pearson: What did Derek look like, his physical appearance when he left?
> Cst. Black: To mine?
> Sgt. Pearson: Yeah? *Did he look like he was fatigued? I understand there was a lot of overtime --.*
> Exhibit 164 – Vol. F-1.35.c, p. 911-12

When Black went on to say that he was very tired, Pearson reinforced the suggestion that Zenk must have been tired as well.

> Sgt. Pearson: Okay. *So I guess it is safe to assume that Derek was probably feeling the same thing, you know, he had been up all night too. He didn't sleep while he was at your house?*
> Cst. Black: No, that's correct.
> Exhibit 164 – Vol. F-1.35.c, p. 912

Pearson also assured Azaransky that there was no big party and we could tell people that is not the case.

> Sgt Pearson: And from what we have seen, there is nothing – first of all, there is no complaint that there was a big raunchy party going on and a big shift (inaudible), and that's certainly not the case. On your behalf we can tell people that's not the case. And no other complaint from anybody has come forth.
> Exhibit 166 – Vol. F-1.35a, p. 874

Pearson was not the only PSU interviewer to telegraph answers to witnesses. Epp while questioning Mikawoz suggested to him why he would not know how much Zenk had to drink.

> Sgt. Epp: Can you tell what he had to drink that evening?
> Cst: Mikawoz: No idea, actually, I believe it was beer, but I don't know.
> Sgt Epp: Okay. *And you know what, as everybody gets talking and stuff and we get busy with out conversation, would you have been in a position to say how many beverages he had that evening?*
> Cst. Mikawoz: No. I'm kind of quiet and I was speaking more to my field trainer and the other guys on my shift that's a recruit as well T.J. So it was really more distant from the all kinds of chatter.
> Exhibit 193 – Vol. F-2.35.u, p. 1189

Ironically, the suggestion by Epp that, as everybody gets talking, they are not observant what others are drinking was advanced by some of the WPS members who testified at this Inquiry as the reason why they did not notice how much Zenk had to drink. With respect, an experienced and effective interviewer would never suggest to a witness an answer that would effectively neutralize the witness's potential usefulness.

Another justifiable criticism was that the twenty-four notice period to the WPS members gave them the opportunity to consult with counsel or other witnesses before they were interviewed. Girard agreed but justified the notice on the basis that a civilian witness does not have to cooperate and be interviewed whereas a WPS member is required by regulations to do so. It was also justified on the basis that it gave the WPS members the opportunity to consider what had happened and that they were now going to be a witness to it. Girard described this as time to "let things soak in re interviews." This rationale fails to recognize that a better investigative technique is to interview a witness as soon as possible. It is true that a civilian witness does not have to co-operate with the police, but it is much better to have a witness who is prepared to co-operate with the police and provide relevant and timely information than a reluctant witness who is compelled by regulation to be interviewed and has had the opportunity to consult with others before giving his or her information to the interviewer.

For some unexplained reason, the PSU chose to interview a key witness like Gerardy in the presence of his employer, Bravo. It was naive for PSU investigators not to note that Bravo, who faced potential civil liability, would have had a motive to downplay the importance of the records, or the amount of alcohol consumed.

Another valid criticism was that there were no follow up interviews if additional or conflicting information was obtained from a witness. For example, Girard received information from Gerardy that was different from what he had been receiving from the WPS members. Gerardy expressed to him some concern about a few people having too much to drink to drive and that he wanted to make sure they were taken care of. However, Girard did not follow that up. In particular, he did not have Gerardy describe who those people were.

In her interview with Girard, O'Halloran said that a couple of the WPS members had more than others and when asked how much, she answered: "Probably about eight beers." He said that he did not follow it up because she was asked and said that nobody was intoxicated when they left the restaurant, although he conceded that he would be concerned that somebody who had eight beers to drink would get in and drive a vehicle.

Girard also agreed that they should have pursued more vigorously the records of Branigan's to determine how much alcohol was actually consumed that evening. Although O'Halloran had told him that she gave all of her receipts at the end of the evening to the general manager, he asked Bravo for the receipts and not Gerardy. He also accepted, uncritically, Bravo's excuse that he was unable to provide the receipts or records of transactions and his assertion that any records would not, in any event, be able to establish how much alcohol was consumed.

Finally, it is clear that the interviews were conducted in a cursory fashion with little intensity. Fourteen interviews were conducted in approximately 225 minutes, an average of 15 minutes an individual. This included reading to each officer a three page protocol.

The details of these interviews are provided in Exhibits 208 and 209, included in Appendix B of this report. The testimony clearly highlights the weaknesses in the PSU investigation.

9. Recommendations

I have outlined my reasons for my conclusion that the investigation conducted by the PSU was doomed to failure from the beginning. In my view, it is unlikely that an investigation can ever be successful where the investigators approach their task with the assumption that they must conduct it with "balance", "assume that the witnesses are telling the truth", allow time to "soak in" before the witnesses are questioned, "not push" the witnesses and telegraph to the witnesses what their answers should be. These self-imposed constraints on PSU investigators are less likely to achieve a successful investigation than an unrestrained investigation conducted of civilian witnesses. In my view, it is unlikely that an investigation can ever be successful where police officers are allowed special treatment before they are interviewed, such as the right to consult with their police association, the right to have interviews during shift hours, or the right to be warned about criminal, civil or administrative implications of the statements they give. Police officers who are witnesses to criminal activity are not entitled to be treated with kid gloves simply because they are police officers, as the WPS members were treated in this case.

Commission counsel made the following recommendations. The first is that the Minister of Justice should

> "cause a study to be commissioned to identify suitable alternatives to having the Winnipeg Police Professional Standards Unit investigate criminal allegations against Winnipeg Police Officers, whether the allegations being investigated fall within the jurisdiction of the Winnipeg Police Service… or not."

I would go further and recommend to the Minister of Justice that he give consideration to creating a provincial special investigative unit independent of all police enforcement agencies in Manitoba for the purpose of investigating any alleged criminal activity of a member of a police service

The second recommendation made by Commission counsel is that I should recommend to the Minister of Justice that he should

> "cause appropriate measures to be taken to prevent police investigators in the province from giving police witnesses special procedural concessions in criminal investigations before they are interviewed, including the right to consult with their police association, the right to have interviews scheduled during shift hours, or the right to be warned about the criminal, civil or administrative implications of the statements they give."

I agree with and concur in that recommendation. In my view, regardless of what form that independent investigative agency takes, it should avoid adopting any procedures that would involve treating police witnesses any differently from the way lay witnesses are treated in criminal investigations.

PART C
THE PROSECUTION OF DEREK HARVEY-ZENK

1. The appointment of Martin Minuk to prosecute Zenk

Martin Minuk (Minuk) is a barrister and solicitor practising law in the City of Winnipeg. He was one of the four, independent, special prosecutors retained by Manitoba Department of Justice to conduct special prosecutions. By letter, dated August 26, 2004, from the Deputy Minister of Manitoba Department of Justice, Minuk had been retained to conduct prosecutions, inquests and provide opinions, on a case-by-case basis, as requested from time-to-time by Brian Kaplan (Kaplan), Director of Regional Prosecutions and Legal Education or Rob Finlayson, Assistant Deputy Attorney General. His retainer was effective from July 1, 2004 to March 31, 2005, inclusive.

At 10:04 a.m. on February 25, 2005, Carter contacted the Crown's office and spoke to Russ Ridd (Ridd), the duty Crown, briefing him on the accident. Ridd said that he would have an independent prosecutor call back and called Minuk to contact Carter. At 10:35 a.m., Carter received a call from Minuk and briefed him on the investigation. Minuk advised Carter on the charges and on the release of Zenk. On March 1, Minuk gave advice to the Winnipeg Police Service PSU relating to the investigations of Zenk's activities prior to the accident. On March 3, 2005, Kaplan sent Minuk a letter, by courier, formally retaining him to handle the Zenk prosecution. Included in that letter was the file that Kaplan had received from Carter.

2. The allegations of conflict of interest by Martin Minuk

The appointment of Minuk to prosecute Zenk was controversial. There was a complaint by Sveinn and Victoria Sveinson (and repeated in the media) that Minuk was in a conflict of interest in prosecuting Zenk, because Minuk had acted for police officers in the past. There was also a complaint that a conflict of interest existed between Minuk and Zenk's trial counsel, Richard Wolson because both had acted for co-accused in a joint trial on a previous occasion.

Dealing with the first complaint, this Inquiry was fortunate to have the expert opinions of Richard Peck, Q.C, (Peck) a member of the Law Society of British Columbia, who has acted as an independent prosecutor in the Province of British Columbia and Brian Gover (Gover), a member of the Law Society of Ontario, who has acted as an independent prosecutor in the Province of Ontario. Both testified before this Inquiry and provided written opinions. Peck expressed the following at page 8 of his opinion:

> "In my mind, the fact that a private practitioner retained to prosecute a police officer has, from time to time, defended police officers is entirely irrelevant. No conflict arises on the basis of class or occupation. Where a conflict might arise is in circumstances where the lawyer has previously represented the very person he or she is called upon to prosecute. There could also be an appearance of conflict if the lawyer has worked closely with the police officer who is the subject of the prosecution, or if the lawyer's practice

> consists entirely of representing police officers such that his or her livelihood depends on the continued business of police officers. With these three exceptions stated, I see no conflict arising where a lawyer who has previously represented police officers is retained to prosecute a police officer with whom he has not had any direct representational or working relationship."

Gover expressed a similar opinion. As far as he was concerned, the issue depends upon the degree to which the lawyer devotes his practice to the defence of police officers and how recently he had done so. Minuk testified that he had last acted for police officers 15 years ago and has only represented three police officers in the past. I agree with the opinions of Peck and Gover. I am satisfied that in accepting the brief to prosecute Zenk, Minuk was not in a conflict of interest based on his past representation of police officers.

The second complaint of conflict, that Minuk was in a conflict of interest because he and Richard Wolson had acted for co-accused in a joint trial on a previous occasion, is also without merit. It stems from an unfortunate misunderstanding of the relationship of members of the Bar to one another. Peck expressed the following at page 9 of his letter of opinion:

> "In the absence of these two lawyers working out of the same firm at the time of the prosecution, there is no conflict in my view. As members of the private Bar, we are often required to work with each other, and, sometimes, against each other. This is not a matter peculiar to the criminal Bar. Civil litigators often act on the same side of a *lis* (sometimes even for the same client) and then find themselves on opposite sides of a different brief. To my knowledge, no one has ever suggested that there is anything wrong with this."

Gover saw no conflict of interest arising where lawyers have acted in the past for co-accused in a joint trial and where one lawyer acts later as a prosecutor and the other as defence counsel. As he pointed out:

> "It is rightly assumed that members of our profession will act in accordance with ethical standards regardless of their acquaintance with opposing counsel."

I agree with both opinions on both questions. In my view, no conflict arose because Minuk and Wolson had acted for co-accused in a joint trial on a previous occasion.

3. The decision by Martin Minuk to release Zenk on a Promise to Appear without conditions

Minuk testified that when he spoke to Carter on February 25, he was told by Carter that Zenk's lawyer was coming to the station and that Zenk would be processed before noon. Minuk instructed Carter to release Zenk on a Promise to Appear (PTA) without conditions. Minuk said that before instructing Carter to release Zenk on a PTA without conditions, he was aware that Zenk was employed as a WPS officer and likely living within the geographic area of Winnipeg and therefore had roots in the community. He felt that there was no risk that Zenk would not appear for his trial. He said that it was the practice in Manitoba to release someone into the care of someone else. He said that he knew that Zenk's lawyer was coming, would take care of him and "get him to the point where he is going to be at home" and "the offence won't be repeated by the offender because he is being taken charge of by another." He did not check into Zenk's recent psychological state or potential history for alcohol abuse because that was probably privileged. He did not consider the need to impose conditions on Zenk that would inhibit repetition of the offence because his employment as a police officer would make it unlikely that he would repeat the offence. He said that it was not uncommon in Manitoba for an officer in charge to release a person on a PTA without conditions after a fatality.

Section 498 of the Criminal Code authorizes an officer in charge to release an accused unless the officer has reasonable and probable grounds to believe it is necessary *in the public interest* to detain him in custody, or if released, he will fail to attend in court. Section 498(1)(i) of the Code provides that *in determining the public interest,* the officer shall consider three things: the need to establish the identity of the accused; the need to secure or preserve evidence of or relating to the offence; or the need to prevent the continuation or repetition of the offence or the commission of another offence. Carter was an officer in charge for the purposes of the Criminal Code and was authorized to release Zenk pursuant to provisions of section 498 of the Code.

Carter said that he had made a demand to Zenk to provide a breath sample because he had reasonable grounds to believe that Zenk had committed the offence of impaired driving within the preceding three hours. Carter said that the "reasonable grounds" he relied upon were based on information from the dispatcher who called him from the station; information he had received from Woychuk who told him that he had a male subject involved in the fatality in the rear of his vehicle; the smell of alcohol from Zenk; and his observations that Zenk was unsteady on his feet walking on the tile and carpeting. The observations of Zenk's impairment were made shortly after 8:12 a.m. when Woychuk brought Zenk to the station. In determining whether Zenk should be released at noon, Carter was required to consider whether Zenk was still impaired and, if released, whether he might repeat the offence. Carter said that he was not concerned that Zenk might repeat the offence because he would be driven home by his counsel, Katherine Beuti.

It was Peck's opinion that it was entirely appropriate and well within acceptable prosecutorial standards to release Zenk on a PTA without conditions. He said that "one possible exception might be where the person has a significant drinking history." In that case it would have been appropriate for the Crown to have asked for a condition that Zenk abstain from the consumption of alcohol during the term of the recognizance and seek such counselling as directed by a Bail Supervisor. Wolson and Minuk said that in Manitoba, it is not unusual for a PTA release without conditions in impaired driving cases. On the other hand, Gover testified that the gravity of the alleged offences and public interests concerns called for a more restrictive form of release. Conditions should have reflected both the nature of the alleged offences and the gravity of the consequences of the alleged conduct of the accused. This could include a prohibition on the consumption of alcohol and attendance at any place licenced to sell alcohol beverages, or even driving. I am persuaded by Gover's opinion. When one considers the fact that Zenk had just been involved in the death of an innocent woman in a horrendous car accident, I find that the decision to release him without conditions is troubling. Only four hours earlier, Carter had charged Zenk with impaired driving on the basis of the symptoms he had observed. It is disturbing that Zenk would be released without any conditions related to the consumption of alcohol or driving. While Minuk cannot be faulted for observing local practice, it is, in my view, a practice that should be reconsidered.

4. Testimony about the contact between Martin Minuk and Manitoba Department of Justice

When Kaplan formally retained Minuk on behalf of Manitoba Department of Justice, he asked Minuk to keep the office apprised as to the status of the matter and to advise of all court dates, if necessary. Minuk's time docket (Exhibit 218) indicates that he docketed 30 contacts with Kaplan, seven contacts with Colleen Ireton (Ireton), Kaplan's assistant, and nine with Donald Slough (Slough) the Assistant Deputy Attorney General.

Minuk said that he discussed all of the issues in connection with the Zenk prosecution with Kaplan and Slough for many months leading up to the ultimate decisions. He said that he had contact with them around the time of his resolution discussion with Wolson; the time he was going to make his submissions on sentence on August 22, 2007; and the time he was going to make his submissions on September 12, 2007. In particular, he had discussions with them when Chief Judge Wyant asked him whether he was going to prove alcohol consumption on the part of Zenk. He said that he had vetted the resolution discussions with Kaplan and Slough. He did not think it was inappropriate to discuss the Zenk prosecution with them. He gave these reasons:

> "Of course, there are two issues that I always need to be mindful of, which is that issue of the fact that I am the independent prosecutor, but also perhaps – and whether this is a function of being in private practice or not, I don't know – but I also perceive this other function or other contact, that this is the client in some ways, and I am keeping them informed on a regular basis as to what's going on. Some cases require more information than others because they may be more serious. Others, they may have a particular interest in where they are asking me to update them on certain things. And as well, because the structure of the prosecution branch allows for meetings and file discussions with senior management group, where lawyers handling files can go and speak to others, although I do know that the ultimate decision on a matter is that of counsel – well, independent counsel who has it – there's no group, so to speak, that the independent counsel can go to in a way that the in-house counsel can go to. And to some extent, Mr. Kaplan and Mr. Slough form that group. They don't instruct, they don't tell you what to do, but they listen, they have experience that can be drawn upon. They can, you know, relate other cases and remind you of government policies, Crown policies. And I don't think that the contact is inappropriate."
> Evidence, p. 5711-13, l. 24-25, 1-25, 1-2

Minuk was asked whether he could see a perception problem that might arise by regular contact with Kaplan and Slough. He expressed this view:

> "Well, perhaps there may be a perception problem, but to understand and to explain what the nature of the contact is and the purpose of it, in my view, clarifies the perception. There is a perception that might be by those who are members of the bar, and there's the public perception which might be different. And I can only see that from my perspective, as a lawyer, I don't see this as a problem, I do appreciate that you may raise this as a public issue, and it's a good thing that I'm telling the Commissioner that this is how it works and the public can understand it. And they would then, I hope, not come to a wrong conclusion about it."
> Evidence, p. 5713-14, l. 18-25, 1-6

On September 21, 2005, Minuk received a fax from Ireton containing a letter from Sveinn and Victoria Sveinson with a request that he draft a response and forward it to her for Kaplan's signature. The letter was a strong criticism of the justice system. Minuk said that in his opinion, the request from Kaplan was not appropriate. He thought that the best way to deal with it was to contact and meet with the Sveinsons and advised Kaplan's office. He said that he never thought about the propriety of an independent prosecutor being asked to write the letter, but believes his decision not to write the letter was probably the right thing to do. On September 28, Minuk received a call from the Sveinsons. He arranged to meet them at his office on October 3. He then called Kaplan and advised him that he was meeting with the Sveinsons and met with them as arranged. What happened at that meeting is discussed in Part D.

Over the next two years, Minuk sent reports to Kaplan updating him on the progress of the file. Minuk contacted Kaplan when Carter revealed that he had been told by Woychuk that Bakema had instructed him what to put in his notes. Kaplan brought in the RCMP to conduct an investigation. A meeting took place May 12, 2006 between Minuk, Kaplan and Gregg Lawlor (Lawlor), general counsel to the Province of Manitoba. They discussed how to frame a letter to Wolson requesting an adjournment, during the investigation of Bakema by the RCMP, without revealing to Wolson the real purpose of the adjournment. Kaplan testified that Lawlor "came up with a sentence or wording or two that might assist Minuk."

On Thursday, July 12, Kaplan received a telephone call at his home around 8:00 p.m. or 9:00 p.m. from Minuk advising that Zenk was prepared to plead guilty to dangerous driving for an agreed-upon joint recommendation for a conditional sentence. He told Minuk that he wanted to sleep on it and to call him in the morning. Kaplan explained:

> "…I just wanted to sleep on it. And in the early morning hours, because I know that Mr. Minuk is an early morning person, that I'd like to rehear more of the information in case I wanted to ask a question or two, just to understand what he was basing everything on."
> Evidence, p. 6600, l. 4-10

> "To me it means I just want to hear it in the light or morning when I am thinking perhaps better to understand what it was."
> Evidence, p. 6601, l. 19-21

Kaplan met with Minuk for an hour the next morning. In a memo that day to Slough about the meeting, Kaplan wrote:

> "The Friday meeting allowed a better understanding of outside counsel's position and his recommendation that the offer should be accepted. I advised him I wanted to run the background by a couple of senior crowns for their opinion."

Kaplan said that in using the word "recommended", he meant that it was outside counsel's recommendation. He also said that he wanted to run it by two of his senior colleagues, because the Zenk prosecution had a great deal of publicity. He said: "I wanted to make perfectly sure, even in my own mind, that this was the proper route." If the recommendation had been "in the realm of egregious," as he described it, he would have interfered with Minuk's recommendation. He did not feel that this was one of those egregious cases. Kaplan did not recall whether he said anything further to Minuk, since this was his decision and he was to go ahead with it. However, Minuk was instructed to deal with Robert Taman and explain "all the circumstances at his arranged meeting Friday morning." It was Kaplan's understanding that the proposal Minuk had put forward was a plea bargain.

> A. I would have concluded that it was plea bargain.
> Q. So what in your understanding did Mr. Minuk trade in order to accomplish the outcome that he secured?
> A. I believe, based on the case law, he would have agreed to the joint recommendation as far a conditional sentence for the offer of that plea by Mr. Wolson's client to the offence of drive dangerous causing death.
> Evidence, p. 6624-5, l.25, 1-9

In other words, the trade-off was Minuk's readiness to agree with precedent that a conditional sentence was the appropriate sentence.

On Sunday, July 15, Minuk sent an e-mail to Kaplan and Ireton setting out his reasons for the position he proposed to take. The next morning, Ireton sent an e-mail to Minuk at 7:00 a.m. inquiring: "What is happening?" Minuk responded that he expected that the plea would be entered the next morning before Chief Judge Wyant. On July 17 the plea to dangerous driving was entered and the matter was adjourned to August 22 for submissions as to sentence. Minuk prepared his submissions as to sentence and sent them to Kaplan. Kaplan said that it was unusual for an independent prosecutor to send his submissions to Manitoba Department of Justice. He did not know why Minuk sent them. Minuk said that he sent them to Kaplan and Slough for any changes or amendments they would have asked or suggested.

On August 28, Ireton sent an e-mail to Minuk asking for his response to articles in the newspapers about victim-impact statements. Kaplan said that the request probably came from the deputy minister's office for information. On September 9, Minuk sent to Kaplan a draft of his proposed submissions to Judge Wyant on September 12 with the note: "Here is a draft for you to look at – any comments or suggestions." Kaplan said that he made no comments or suggestions. On September 12, Minuk called and spoke to Kaplan and Slough during a recess that Minuk had requested when Judge Wyant asked whether he was going to prove the consumption of alcohol. Kaplan said that Minuk told him what had happened and he asked Minuk: "What do you think?" Minuk replied: "I don't believe we should call any evidence." Kaplan said that he told him: "That's fine." He meant he was okay with that and that was the end of the conversation. Minuk testified that his call to Kaplan and Slough was to tell them what he was doing:

> "…and get a sort of second look, so to speak, just to make sure that I was not, in the stress of the moment, not thinking clearly.
> Q. And you might change your mind as a result of the conversation with them? You wanted their input because you might change your mind?
> A. If I wasn't thinking clearly, perhaps that would be a good point to get some advice on."
> Evidence, p. 6091, 2-10

5. The decision of Martin Minuk to enter into a plea bargain with Wolson

The investigation conducted by the ESPPD and the PSU left Minuk with what Peck aptly called as a "prosecutor's nightmare." Slough fittingly described the case as a "train wreck." Minuk was justifiably concerned that he would be unable to prove the charges of impaired driving causing death and refusal to provide a breath sample, because of the investigative errors. It is also clear that he would have difficulty proving criminal negligence causing death.

Many of the problems of proof that Minuk noted with respect to the charges of criminal negligence, impaired driving and refusing to provide a breathalyzer sample did not apply to the dangerous driving causing death charge. Minuk, however, had never conducted a thorough investigation of the evidence that supported this charge. For example, although Carter did not follow his instructions to apply for a search warrant to seize the Brannigan's sales records, Minuk did not pursue the records on his own. He never interviewed any of the lay witnesses, such as Bukowski, Beattie or Shaw before he entered into discussions with Wolson. The only WPS members that he interviewed were Black, Anderson and Humniski. He did not adequately assess all of the accident reconstruction evidence of Blandford. In particular he did not assess that Zenk would have had a 15-second warning of the advance lights; that there was flashing yellow light and a red light at the intersection; that cars were stopped at the intersection; that the roadway was straight and the weather clear; that the Zenk vehicle travelled in a straight line without variation in speed from the estimated 80 kilometres per hour; that there was no braking; and the Zenk vehicle was able to stay on the road after the accident. All of this evidence was inconsistent with Minuk's concession that the accident could have been caused by a momentary lapse of attention. He also failed to adequately assess all of the evidence, of both police and lay witnesses, in concluding that he was unable to prove that Zenk had consumed alcohol before the accident.

Minuk said that as he started to prepare for trial, he realized that he would have difficulty proving criminal negligence causing death, impaired driving causing death and refusal to provide a breathalyzer sample. He said that when Wolson called and proposed that Zenk should plead guilty to dangerous driving causing death and that there should be a joint recommendation for a conditional sentence, he felt that it was a good resolution of the case. It was his evidence that, prior to accepting Wolson's proposal, he had reviewed all of the cases from the mid-1990s to 2007, dealing with both dangerous driving causing death and impaired driving causing death. He concluded that the range of sentence proposed by Wolson was similar for both cases. If I understand Minuk's evidence correctly, he was prepared to enter into an agreement with Wolson to accept a plea of guilty to dangerous driving causing death with a joint recommendation for a conditional sentence because he did not feel that the court would impose a harsher sentence because of Manitoba Court of Appeal precedent.

6. The nature of a plea bargain and a joint submission or recommendation

In the Province of Manitoba, the Court of Appeal has drawn clear distinction between a joint submission as to sentence, which is part of a plea bargain, and a joint submission not based on a plea bargain.

A plea bargain by its very language is a bargain with respect to a plea to a charge or a series of charges. It may involve three areas of negotiation. It may involve negotiating the charge or charges to which the accused will plead guilty in exchange for a withdrawal or stay of another charge or charges. It may involve an agreement by the accused to plead guilty to a certain charge or charges in exchange for a recommendation by the prosecutor for a specific sentence. While there may be ethical limitations on the practice, a plea bargain may also involve an admission to certain facts, thereby eliminating the need for the Crown prosecutor to prove them, in return for an agreement not to introduce certain other facts into evidence. Regardless of what has been agreed upon, there will only be a true plea bargain where each side, the Crown and the defence, gives up something in exchange for something, a *quid pro quo*.

There may be many reasons why the Crown and defence may decide to enter in to a plea bargain. For example, the Crown may have concluded that it will have difficulty proving a particular charge and has agreed to accept a guilty plea to a lesser charge, or the accused has agreed to plead to the greater charge upon the understanding that the Crown will recommend a lesser sentence than the one usually imposed for the offence. Where there has been an exchange of a *quid pro quo*, there is a true bargain.

It follows that not all joint submissions for a specific sentence are a true plea bargain. An simple agreement between the prosecutor and the defence that they will make a certain recommendation to the trial judge as to the sentence to be imposed, because each believes the sentence is an appropriate one, is not a true plea bargain because nothing has been exchanged to achieve that agreement or bargain. The prosecutor and the defence have simply agreed to make a joint recommendation as to what they believe is the appropriate sentence that should be imposed on the accused.

The trial judge has no jurisdiction to accept or reject a plea bargain. The trial judge has no control over what charges the prosecutor presents to the court; what facts the Crown presents in support of the plea; or to what charges an accused pleads guilty. The prosecutor has the absolute right to decide what charges he or she will prosecute and the accused has the right to decided to what charges he or she will plead guilty. On the other hand, the sentencing judge is not bound by the terms of any plea bargain that has an agreement between the Crown prosecutor and the defence as to the sentence that the judge will impose on the accused. The question of sentence has always been regarded as a matter within the domain of the trial judge.

The Manitoba Court of Appeal has said that where there has been a *quid pro quo*, a true exchange of something for something between the prosecutor and the defence, the trial judge should not depart from a joint recommendation of sentence unless the judge concludes that the sentence is unreasonable; is unfit; would bring the administration of justice into disrepute; or would be contrary to the public interest: *Sinclair* (2004), 185 C.C.C.(3d) 569 (Man.C.A.). On the other hand, where there is simply a joint recommendation as to sentence, there has been no plea bargain. There has been no *quid pro quo* in exchange for the sentence. Since there has been no bargain, the sentencing judge is not required to give the same consideration to the recommendation.

Kaplan was asked if he considered whether there was a distinction between two counsel, senior or otherwise, each agreeing that the proper outcome of a case is a plea to one charge and a conditional sentence on the one hand, and on the other hand the parties trading something by way of *quid pro quo* in order to accomplish some type of compromise. Kaplan was of the view that it was a distinction without a difference. With due respect, he is wrong in that view. It is accepted that, in Manitoba, only the latter is a plea bargain and the former is a joint recommendation.

Given the importance of the distinction between true plea bargained sentences and simple joint recommendations, it is important to understand the nature of the agreement that was reached by Wolson and Minuk. Was the agreement a plea bargain with a joint submission as to sentence or was it simply a joint submission as to sentence. As we will see, the transcript of the evidence of the proceedings on September 12, 2007, indicates that Chief Judge Wyant was clearly aware of the distinction between a joint submission following a plea bargain and a joint submission where there was no plea bargain. He was troubled by the way the case had been presented to him by the prosecutor and counsel for the defence. The way the sentencing position was put to him by Minuk and Wolson left Chief Judge Wyant in the dark.

7. The events leading up the plea of guilty by Derek Harvey-Zenk to dangerous driving causing death and the staying of the other charges

Wolson was retained as counsel to defend Zenk. He is a prominent defence counsel practising in Winnipeg. He was called to the Bar in Manitoba in 1973 and has practised as criminal defence counsel since his call to the Bar. He said that in the past 25 years, he has tried over 1,000 impaired driving cases. He has been a lecturer for the Federation of Law Societies' summer criminal law program since 1985, delivering papers and sitting on panels dealing with alcohol related offences. He testified that, after receiving disclosure from the Crown, he realized that there were many investigative difficulties in the Crown's case with respect to the charges of criminal negligence causing death; impaired driving; and refusal to provide a breathalyzer sample. However, he felt that he only had a 20 per cent to 25 per cent chance at the most in defending the charge of dangerous driving causing death. On the other hand, if the Crown proceeded only with the dangerous driving charge, thereby making the evidence a simpler case and less controversial, it was his view that his chance of success would be reduced to 10 per cent to 12 per cent.

Wolson recalled that Minuk wrote him a letter May 18, 2006 advising that he was seeking an adjournment of the preliminary inquiry to permit further investigation. He presumed that it was to further investigate the case they were litigating and made no further inquiries. He agreed so that he might have the availability of further evidence that the investigation might uncover that might assist the defence. In fact, the request for an adjournment had nothing to do with an investigation of the case. Minuk had asked the RCMP to investigate the information that had been related to Minuk by Carter that Bakema had possibly committed the offence of obstruction of justice by directing Woychuk to alter his notes. Wolson left Minuk a telephone message agreeing to an adjournment, but advised Minuk that the case would have to be scheduled for the following year, because he was busy with other cases. Minuk agreed and the case was adjourned to Monday, July 16, 2007 for a preliminary inquiry.

Wolson said, that while preparing for the preliminary inquiry, he realized that he might have difficulties in defending the dangerous driving causing death charge. However, he was confident that he could successfully defend the other charges. On Thursday or Friday, prior to the preliminary inquiry date on July 16, Wolson said that he called Minuk. He told him that he thought that Minuk was going to have a lot of difficulties in his case around alcohol-related charges, but did not tell him what those difficulties were. Minuk replied: "I know."

Wolson asked whether Minuk would agree to accept a plea of guilty to dangerous driving causing death; stay the remaining charges; and jointly recommend a conditional sentence with no order, under the Criminal Code prohibiting driving. Minuk said that he would "put it to his client," the Manitoba Department of Justice. Wolson wanted Minuk to go to his client before he went to Zenk to suggest that he plead to the dangerous driving charge. Wolson said that Minuk called him back, indicating that he had vetted the matter with his clients and would accept the plea and the conditions suggested by Wolson.

Wolson met with Zenk over the weekend and received his instructions to plead guilty in accordance with their resolution discussions. Wolson said that he understood that the resolution was a plea bargain both as to plea and as to sentence. He had also asked Minuk whether the Taman family was agreeable to the bargain. Minuk wrote him a confirming letter adding that: "…there is a militant father and mother of the deceased. The husband and children are on side." Wolson wanted to meet with Chief Judge Wyant to see whether he would be favourable towards the plea bargain and asked Minuk to set up a meeting. He also dictated a memo to his file, confirming the arrangement.

A meeting with Chief Judge Wyant was arranged for July 16, 2007. Minuk and Wolson met with Chief Judge Wyant and advised him that Zenk would plead guilty to dangerous driving causing death and that Minuk would stay the remaining charges. Chief Judge Wyant was told by Wolson that Zenk was a police officer and would either be forced to retire or would be fired. Minuk provide him with a brief outline of the facts. Chief Judge Wyant asked Minuk what the feeling of the victim's family towards the plea was and Minuk advised him that they were okay with the resolution. Chief Judge Wyant said that he would give serious consideration to the submission of senior counsel. Both Minuk and Wolson left the meeting with the feeling that their recommendation would be accepted.

On the day scheduled for the beginning of the preliminary inquiry, Judge Stewart, the presiding judge, was advised that the matter was to be adjourned to the following day before Chief Judge Wyant for plea. The matter was therefore adjourned at the request of Minuk and Wolson. On Tuesday, July 17, 2007, Zenk was arraigned on a charge of dangerous driving causing death before Chief Judge Wyant and pleaded guilty. Minuk did not read into the record the facts that the Crown relied upon in support of the plea. Chief Judge Wyant accepted the plea and indicated that he was recording: "a guilty plea to the charge of dangerous driving cause death." Minuk then stayed the charge of refusing to provide a breath sample, impaired driving causing death and criminal negligence causing death. The case was adjourned to August 22, 2007.

On August 22, 2007, Minuk and Wolson made their submissions on the facts and jointly recommended that the sentence should be a conditional sentence of two year less a day with terms, but there should not be a driving prohibition under the Criminal Code. Chief Judge Wyant indicated that he wanted some time to consider the submissions and adjourned the case to September 5, subject to the availability of counsel.

On August 31, Chief Judge Wyant wrote a letter to both Minuk and Wolson indicating that he was:

> "contemplating rejecting the plea bargain …on the basis that this offence was committed by a police officer and that a higher standard of conduct is expected of a person in this position."

In his letter, Chief Judge Wyant indicated that it was critical that both counsel be afforded the opportunity to make further submissions "respecting the joint sentence." Both counsel were directed to contact the trial co-ordinator to arrange for a hearing date. The date of September 12 was selected.

8. The confusion as to the agreement between Martin Minuk and Richard Wolson

As will be seen shortly, the transcript of the proceedings on September 12 reveals that Chief Judge Wyant had some justifiable concerns about the nature of the agreement that had been reached by Minuk and Wolson. What he wanted to know was whether there had been a plea bargain as to the plea and sentence to be recommended or was it simply a joint submission as to sentence. If it was a plea bargain, he wanted to know what the *quid pro quo* or "exigencies" as he called them were. He was concerned about the joint recommendation that had been made to impose a conditional sentence of two years less a day on a police officer. The sentence that he was considering imposing depended upon whether it was a true plea bargain with a joint recommendation as to sentence or simply a joint recommendation as to sentence. If it was a plea bargain, he was constrained by the case law. If it was not a plea bargain, then there were not the same constraints upon him to reject the sentence that had been recommended.

Minuk was asked whether his decision to stay the charges of criminal negligence causing death; impaired driving causing death; and refusal to provide a breath sample were part of the bargain. Minuk said that they were not. Those charges were stayed:

> "not because the accused pleaded guilty to danger driving, but because of the Crown's obligation I described to you in my earlier remark. That obligation is to have and to be able to present to the court legal proof."
> Evidence, p. 15

Minuk then explained to Chief Judge Wyant the difficulties that arose for the Crown in proving the charges of impaired driving and refusal to provide a breathalyzer sample against Zenk. He had stayed these charges because of the investigation conducted by the ESPPD:

> "In short, no evidence capable of meeting the required standard for prosecutions, a reasonable likelihood of conviction and all the moreso, no evidence resisting a Gardiner challenge was available to the Crown in respect of the offences of impaired driving and refusing the breathalyzer."
> Evidence, p. 16

Minuk went on to explain (Evidence p. 16-17) that the "exigencies" of this case are such *that a guilty plea to any charge* the accused faced would not have been anticipated by the Crown. He offered this explanation:

> "In this regard the Crown is very mindful that the accused, who at the time of the offence was a police officer offered to plead guilty to a very serious indictable offence and give up his rights to a preliminary inquiry and a trial on a matter fraught with issues more difficult for the prosecution than the defence."
> Evidence, p. 16-17

What were the issues that were difficult for the Crown in proving the charge of dangerous driving? After a lengthy review by Minuk of the cases on sentencing, Chief Judge Wyant was still not satisfied as to what had been exchanged in the bargain:

> "All right. Well let's, let's move to that. And so for the record, only the facts presented in this courtroom will be a consideration in my judgment, so that that's very clear for the record. But let's move on to the issue of joint recommendations because I have to say, candidly, Mr. Minuk, I'm somewhat confused by your submissions in one regard, and in a sense taken aback because I now have more information from you on the basis of the joint recommendation that was being presented in these initial submissions. And, let me elaborate.
>
> As I heard you say and I, I may have to review the transcript, you indicated and clearly stated, and of course I clearly accept this that charges were not stayed because the accused pled guilty. *They were stayed because the Crown did not have – was satisfied it did not have the legal proof.* Correct?
> Mr. Minuk: Correct."
> Evidence, p. 23

Chief Judge Wyant then went on to point out that he was confused with Minuk's submissions because he understood the case was presented as a plea bargain. He now understood that it was not really a bargain, and that Minuk had stayed the other charges, not because they were part of the bargain, but because the Crown could not prove them. He pointed out that Minuk had said:

> "You also I thought I heard you say in the beginning, that the Crown was satisfied that it did have proof of dangerous driving cause death, that, that you had – hang on—that, that's what I heard you say, that there was evidence available for that charge, not clearly for the other charges."
> Evidence, p. 23-24

Minuk, however, went on to explain what he meant by proof of dangerous driving:

> "I told you, if the language that I've used was that on the test for the prosecution and the laying of the charge was there a reasonable likelihood of conviction, the answer to that is yes. Can I, I said to you and further a trial is conviction or is the evidence sufficient beyond a reasonable doubt, that can never be a certainty."
> Evidence, p. 24

Quite understandably, this only confused Chief Judge Wyant more. What Minuk was saying was that although he was satisfied that there was a reasonable likelihood of conviction, he could not be certain. "Well, of course it can never be a certainty…" But exactly what did Minuk mean? Chief Judge Wyant was obviously confused with this answer:

> "But now, now you you're coming back and now as I first heard you say, we couldn't prove these other cases but we could prove this and the accused came forward and said that he was prepared to plea to that. That doesn't, it seems to me in that description speak of a plea bargain or exigencies or quid pro quo. But then you went further and then said, the exigencies of this case, the guilty plea, gave up his rights to trial, you quoted basically what the Court of Appeal has said.
>
> And I'm confused. I'm confused for a number of reasons. I have never heard this before, never, and it's clearly a very, very, very, significant part of the sentencing process. Now I'm hearing it the second time around when I called you back. And secondly, I'm not quite sure that what you said in the beginning really is in line with, with your comments that there's a plea bargain. Is there a plea bargain or not. That's, that's really the question. Could you prove dangerous driving cause death? And if you could, which is what I thought you said, then is there really a plea bargain because the accused offers to plead guilty because he accepts the fact that the factual basis for that plea is there? I mean, you have to be careful how you define plea bargain and exigencies."
> Evidence, p. 25

As noted in the previous section, a plea bargain involves an exchange of a *quid pro quo*, something for something. If Minuk and Wolson had entered into a plea bargain, what had the defence given up in exchange for a stay of proceedings on the other three charges? Minuk explained that the Crown had given up the uncertainty of obtaining a conviction on the dangerous driving causing death charge, even though he was confident of the Crown's evidence. But, as Chief Judge Wyant pointed, there is never any certainty in a conviction even with the strongest cases. Minuk attempted to explain what he meant but only repeated what he said earlier, that he believed he could prove the dangerous driving causing death case:

> "I, I don't know and cannot predict the outcome of the case, but I can tell you that the Crown did believe, does believe, always believed that we could prove dangerous driving. Wouldn't accept a plea of guilty to it if we didn't think we could prove it. That in itself would be wrong."
> Evidence, p. 26-27

Chief Judge Wyant was not satisfied with Minuk's explanation for calling the agreement, which he reached with Wolson, a plea bargain. What had Minuk given up in exchange for staying the charges and entering into a joint recommendation for a conditional sentence, when Minuk said that he felt that the Crown could prove dangerous driving causing death?

Chief Judge Wyant stated:

> "I guess I'm probably not making myself clear. There is, it seems to me, a difference to me between what is a meeting of minds, in other words both counsel saying we believe the factual basis for a plea is here. We believe the, the recommendation is appropriate and making that joint recommendation. And counsel – or as opposed to counsel making a plea bargain where there are exigencies, and therefore, that forms part of the, of the recommendation. And as I said, I never heard any of that. In fact, the transcript's pretty clear that both counsel felt the factual basis was there, and both counsel also felt, in the meeting of the minds that the, that the sentence recommended was appropriate. And it seemed in your comments today seemed to bear that out for a while until you then said there were exigencies in the case. There's always uncertainty in the criminal case. There's no question. You can never predict the outcome of a, of a trial. That's different than exigencies and *quid pro quo* and what the Court of Appeal has said on many occasions, so..."
> Evidence, p. 27

Chief Judge Wyant went on to point out, quite correctly, that Minuk was confusing a true plea bargain with the situation where an accused pleads guilty and throws himself on the mercy of the court and shows remorse. (Evidence, p. 28). A plea bargain was different because the accused had to give up something. Giving up something did not mean pleading guilty to a charge the Crown could prove.

Faced with Chief Judge Wyant's questions, Minuk then referred to some cases where an accused had been acquitted. He then stated that his case was "not the clearest of cases where the evidence is so overwhelming." This was an expression which Chief Judge Wyant said that he had not recalled him using before (Evidence, p. 30). Minuk then changed his earlier position as to the strength of the case and told Chief Judge Wyant that "the case was weak" (Evidence, p. 32) and was "a case which was not very strong on the facts…" (Evidence, p. 33). Now that Minuk was telling the court that the case was not a strong one but in fact a weak one, Chief Judge Wyant was prepared to accept that "this was a plea bargain as you've described…" (Evidence, p. 35).

When Wolson was given an opportunity to make submissions, he stressed that this was a case where alcohol did not play a part in the plea of the accused, that it was a case of "in effect not keeping a proper lookout, that there was a departure from the norm" and that was the basis for the plea. He did not accept the consumption of alcohol as any part of the plea. The issue was an unexplained accident. Wolson referred to a head injury saying: "I would expect that he did fall asleep, I don't know." He stressed that it was a joint recommendation. He then referred extensively to the sentencing authorities and submitted that the only issue is whether an off-duty police officer should be treated more severely and is disentitled to a conditional sentence.

Chief Judge Wyant then put to Wolson the very issue that bothered him and that was raised with Minuk. Was it or was it not a true plea bargain? Chief Judge Wyant needed an answer because it was one of the factors that the Court of Appeal considered in determining whether or not the trial judge was correct in rejecting a joint submission as to sentence.

Chief Judge Wyant stated:

> "And of course you're aware, and I've canvassed this with Mr. Minuk earlier, that there are joint submissions and there are joint submissions as a result of plea bargains. The two things are actually different. A joint submission is where counsel have a meeting of the mind, because they accept the factual basis for the plea, and in fact based on sentencing precedents accept that a certain sentence or something within the range of a certain sentence is appropriate.
>
> A joint recommendation based on a plea bargain is where there are exigencies. Where there are difficulties in the case, not where there's just an acceptance that there's factual proof, but difficulties in the case such so that the extreme uncertainty of the subsequent trial, and there's always uncertainty, as I've pointed out to Mr. Minuk, but the extreme uncertainty based on the exigencies cause counsel to engage in a *quid pro quo* and arrive at a plea bargain. And last time that was never presented, and Mr. Minuk now says that this was in fact a true plea bargain. And I just, I need to canvass that with you, because there's no question it's a joint submission. The two of you have a meeting of minds not only with respect to the, the fact that the plea is justified, but on the basis of the sentencing precedents what the court ought to consider. *But is it a plea bargain? That's the question.*"
>
> Evidence, p. 54

Wolson did not answer directly whether it was or was not a plea bargain. What he said was:

> "Well, I think when experienced counsel discuss cases and they point out as defence would do that there's some weakness here, but in return for that not contesting the matter and believing that a, a plea can be made justifiably, as I have and as I've said to you earlier today, then in my view, you ought to accept that two counsel who know the case advance a position of a recommendation, obviously we take into account what our positions are. We take into account that there may be some issues of, of – that are contested because of I might say issues as to the nature of the investigation, it's just part of the process. I didn't. I didn't put it on the record before, quite frankly. I, I simply indicated to you the basis of the plea, the fact that the plea is not as a result of impairment as I stated before, but as a result of, *of momentary lapse* and not – I ought to have said not keeping a proper lookout in the circumstances. That's the nature of the plea.
>
> Now, I don't think that I can go further than that. I think when counsel look at the case and they see difficulties with the case, it's part and parcel of the process of the discussion that led to the joint recommendation."
> Evidence, p.55

Chief Judge Wyant then asked Wolson whether alcohol was a factor in the plea and Wolson stressed that it was not. Wolson said to Chief Judge Wyant that the plea was entered on the factual basis that it was a momentary lapse of attention or the failure to keep a proper lookout by Zenk. He said that this constituted the ingredients of the charge of dangerous driving causing death. Chief Judge Wyant then indicated that he was obliged to ask Minuk whether he intended or wished to call evidence on alcohol consumption as part of the plea. Minuk asked for a five-minute adjournment and left the courtroom. During that five-minute adjournment, Minuk placed a call to call Kaplan and Slough. When court resumed, Minuk told Chief Judge Wyant that he was not going to call any evidence of alcohol consumption. Chief Judge Wyant then adjourned the case to October 22. On that day, Chief Judge Wyant imposed a conditional sentence of two years less a day on Zenk. He did not impose a driving prohibition pursuant to the Criminal Code as had been agreed upon by Minuk and Wolson.

9. What the cause of the confusion was for Chief Judge Wyant

In my view, there were two reasons why Chief Judge Wyant was confused in attempting to determine whether Minuk and Wolson had reached a plea bargain on the charges that the Crown would prosecute and, if so, what the underlying facts of the bargain were. The first reason is the practice that is followed in Manitoba Provincial Courts as described by Wolson to this Inquiry. The second is the failure of Minuk and Wolson to present a formalized statement of the terms of their plea agreement to Chief Judge Wyant.

Wolson advised this Inquiry that, where an accused intends to plead guilty in the Manitoba Provinical Courts, the accused or his counsel will waive arraignment and the reading of the charge, and indicate that the accused intends to plead guilty to one or more specified offences. The judge will then inquire of the accused whether he understands the significance of his plea and the accused will be asked how he pleads. The accused will then enter his or her guilty plea, the judge will record a conviction and the matter will be adjourned to another day for sentence while a pre-sentence report is obtained.

If the Crown does not intend to proceed with any additional charge or charges, the Crown will ask that the charge be stayed instead of withdrawing the charge. At the time that the guilty plea is entered, the Crown does not read into the record the facts relied upon in support of the plea. Those facts in support of the plea are presented to the judge on the date of sentencing. Wolson said that if the accused or his counsel indicates, at any time before sentence is imposed, that he or she disagrees with an allegation of the Crown in support of the plea, the judge will strike the plea of guilty. He indicated that even a comment by the accused to the probation officer preparing a pre-sentence report that the facts are not admitted will cause the case to be referred back to the judge who accepted the plea, who may then strike the plea.

The Criminal Code is clear that there should be an election by the accused as to his or her mode of trial (where there is a right to an election); the accused should be arraigned upon the charge that the Crown is proceeding with; and the accused's plea of guilty should be taken and recorded by the clerk of the court. The authorities are clear that the Crown should then be required to state the facts upon which the Crown relies in support of the plea. The defence counsel or the accused where he or she is unrepresented should acknowledge acceptance of those facts. Although subsection 606(1.1) (a) and (b)(i)) of the Criminal Code imposes upon a trial judge the obligation to be satisfied that the accused is making the plea voluntarily and that he understands that the plea is an admissions of the essential elements of the offence, the duty upon the judge does not stop there.

The judge should not accept the plea unless he or she is satisfied that the facts, read by the Crown and acknowledged by the accused, support the plea. There is a duty upon the judge to reject the plea if the facts alleged by the Crown and accepted by the defence, do not support the plea: *Johnson and Creanza* (1945), 85 C.C.C. 56 (B.C.C.A.); *Hand (No.1)* (1946) 85 C.C.C.388 (B.C.C.A.), *Gordon* (1947), 88 C.C.C. 413 (B.C.C.A.); *Doiron* (1958), 124 C.C.C. 156 (N.B.S.C. App. Div.).

If the Crown alleges acts committed by the accused in aggravation of the offence, which the accused denies, the Crown is required to adduce evidence to prove those facts. In *Gardiner* [1982], 2 S.C.R. 368 which Minuk referred to in his submissions, the Supreme Court said that the Crown must establish the commission of those aggravating acts by the accused beyond a reasonable doubt. Unless those alleged aggravating acts are established beyond a reasonable doubt, the trial judge must ignore them when imposing sentence.

It was suggested by Peck and Gover that the problem of uncertainty on the part of Chief Judge Wyant over what had been admitted could have been avoided if Minuk and Wolson had entered into a written, agreed, statement of facts which had been presented to Chief Judge Wyant. While an agreed statement of fact would have gone a long way to avoiding the problem that occurred in this case, a written, agreed, statement of fact is not always necessary. What is important is for the Crown to advise the presiding judge in open court exactly what facts he or she is relying upon in support of the plea. Also the Crown court should obtain the acknowledgement, in open court, of counsel for the defence or the accused that they accept those facts in support of the plea. Here, Minuk failed to set out clearly the facts that supported the plea.

Minuk also failed to alert Chief Judge Wyant on August 22, 2007 that the joint position, arrived at by him and Wolson, was as a result of plea bargain, which he had a responsibility to do as prosecutor.

It was recommended by Commission counsel that I should recommend to the Minister of Justice that he cause a Ministerial Policy to issue relating to the presentation of guilty plea requiring that:

> (a) at the appearance where the plea of guilty is made, prosecutors must present the presiding judge with the factual foundation for the criminal charge, and call for a clear admission of the facts to be made by the accused, and further requiring that
> (b) in complex or serious cases [as defined by Manitoba Department of Justice] that prosecutors shall attempt to secure in writing, the agreed statement of facts that will form the foundation for the plea

I agree with, and adopt that recommendation.

In the early 1990s, the late Honourable G. Arthur Martin, Q.C., considered by many as Canada's pre-eminent expert on criminal law, was asked by the Attorney General of Ontario to conduct a study on Charge Screening, Disclosure and Resolution Discussion. On page 323 of his report, released in 1993, he made the following recommendation:

> "It is improper for the Crown to withhold from the Court any relevant information in order to facilitate a guilty plea. In cases where not all matters are admitted, the Crown should advise the Court of the allegations and then proceed upon the admitted facts. In such cases, the Court will sentence on the admitted facts only."

The basis of his recommendation was as follows:

> "The recommendation is made in the interests of ensuring that there is placed on the record in open court all information that assists the public, victims, and witnesses in understanding how the charges initially laid by the police following a criminal act resulted in the plea and the disposition proposed by counsel following resolution discussions. There is a risk of undermining public confidence in the administration of justice if an offence which appeared grave at the time of the arrest is, when disposed of by an agreed-upon plea, treated as a less serious offence with no explanation offered for the change in position."

That judge found support for his recommendation in a report prepared by the Honourable A.S. Dewar at the request of the Attorney General of Manitoba, October 1988 (p. 52-53) known as the Dewar Report:

I would therefore make the following recommendation:

> "That the Minister of Justice cause a Ministerial Policy to issue requiring all prosecutors to recognize that it is improper for the Crown to withhold from the court any relevant information in order to facilitate a guilty plea and, where not all matters are admitted, to advise the court of the allegations and then proceed upon the admitted facts."

Commission counsel recommended that I recommend to the Minister of Justice that he cause a Ministerial Policy to issue requiring all prosecutors who resolve charges through resolution discussion to state clearly for the record the basis upon which the resolution was reached, including by:

(a) stipulating any compromises or concessions that have been made by the prosecutor in securing the guilty plea

(b) explaining, with specificity, any exigencies that motivated the prosecutor to refrain from proving aggravating facts, or to agree to the sentence being proposed, or to stay any related charges

I agree with, and adopt, that recommendation.

Exhibit 252, is a letter (dated August 8, 2008) from Slough to Mr. Paciocco indicating that it was the intent of policy directive Laying and Staying of Charges (Exhibit 216) that "it is not the normal practice to formally disclose on the court record why charges have been stayed, unless the decision has been made to stay or withdraw the charges pursuant to the public interest factor." No reason was provided why disclosure should be restricted to the public-interest factor. Surely, it is always in the public interest to know why a charge has been stayed.

I therefore make the recommendation requested.

10. Was the agreement reached between Minuk and Wolson a true plea bargain

The agreement reached by Minuk with Wolson must be recognized to be a plea bargain, although a lopsided one in favour of the defence. As already noted, and Chief Judge Wyant explained to Minuk and Wolson, a plea bargain is an exchange of a *quid pro quo*, something for something. Chief Judge Wyant had some legitimate concerns as to whether there had been a true plea bargain. I share those concerns. What did Wolson give up in exchange for a plea of guilty to a charge of dangerous driving and a conditional sentence? Kaplan said that the trade off was the agreement by Minuk, that as a matter of precedent, the case falls with the realm of a conditional sentence. Minuk told Judge Wyant at the beginning of their colloquy on September 12, 2007 that he had a strong case of dangerous driving. As the discussion continued, Minuk attempted to justify the bargain on the basis there was a risk that the Crown could not succeed on the dangerous driving charge. When Judge Wyant responded that there was always a risk that a prosecution would fail, the dangerous driving charge which was once considered by Minuk to be a strong case, it became weaker and weaker until Judge Wyant was told that the case was now a "weak one" and "not very strong on the facts."

Peck was of the view that it was consistent with the Manitoba Crown's policy directive for Minuk to agree to accept a plea of guilty to dangerous driving causing death and a joint recommendation for a condition sentence of two years less a day. It was Peck's opinion that given the state of the investigatory record, Minuk was acting within acceptable prosecutorial standards in deciding not to prove the consumption of alcohol in this case. His opinion was also based on the fact that courts often imposed conditional sentences for dangerous driving causing death. He relied upon the directive of January, 2005, requiring an independent prosecutor to be guided by the prosecution policies issued on behalf of the Attorney General of Manitoba and applicable to all prosecutions undertaken by the Province. This directive reads in relevant part:

> "It is proper for Crown counsel to make agreements respecting pleas or sentence with a view to avoiding an unsuccessful prosecution. Thus, for example, where the deficiencies in the available evidence create a substantial likelihood of acquittal, it is appropriate for Crown counsel to agree to pleas of guilty to lesser but related charges or agree to recommend a less severe sentence than would otherwise be sought provided such agreement does not bring the administration of criminal justice into disrepute."

Gover disagreed. He was of the view that it was not within acceptable general prosecutorial standards to agree to this plea bargained arrangement. He regarded a conditional sentence of two years less a day for the offence of dangerous driving causing death as extraordinarily lenient for two reasons. The first was the fact that Parliament had expressed the view that conditional sentences should not be available for the defence of dangerous driving causing death. On December 1, 2007, an amendment to section 742.1 of the Criminal Code came into effect. The amendment provided that conditional sentences would no longer be available for offences involving serious personal injury (as defined by section 752) and those offences punishable by maximum terms of imprisonment of 10 years or more. Dangerous driving causing death is a serious personal injury offence and is punishable by a maximum term of imprisonment of 14 years.

Gover recognized that section 11(i) of the Charter of Rights and Freedoms guarantees an accused the benefit of a lesser sentence if sentenced after December 1, 2007. But it was still open for the Crown to cite the amendment as evidencing Parliament's intention that conditional sentences not be granted for this offence. His second reason was that, given the available evidence of alcohol consumption; the presence of some indicia of impairment; and the absence of any explanation for Zenk's failure to stop, the submission by Minuk that a conditional sentence for the offence of dangerous driving causing death was so lenient as to be outside the range of sentence and to bring the administration of justice into disrepute.

I agree with Gover's opinion. The case was not "a case which was not very strong on the facts" or a "weak case" as Minuk portrayed to Chief Judge Wyant at the end of his submissions. Nor was it just "a good case," as he told Chief Judge Wyant at the beginning of his submissions. In my view, the dangerous driving causing death case was very strong on the facts and on the evidence. Even Wolson testified before this Inquiry that he felt that he had no more than a 10 per cent to 12 per cent chance of obtaining an acquittal. Zenk had driven his truck, under ideal weather conditions on a straight highway that was marked with yellow caution lights and with a red light at the intersection, in a straight line into the back of Crystal Taman's vehicle. There was evidence that Zenk's vehicle never wavered all over the road. There was evidence that Zenk never attempted to avoid the collision or applied his brakes before the collision.

The report of Blanford, the RCMP Forensic Traffic Collision Reconstruction (Exhibit 60), which was part of the Crown brief sent to Minuk, indicated that Zenk, if driving at 80 kilometres, as Shaw estimated Zenk's speed to be, would have had at least 15 seconds warning before the lights at the intersection changed to red. A period of 15 seconds without an appropriate response can hardly be considered a momentary lapse of attention as was suggested by Minuk and Wolson. Minuk's only justification for the agreement, as he told Chief Judge Wyant on several occasions, was that he could not predict the outcome of the case. However, as Chief Judge Wyant reminded him, no prosecutor can ever predict a conviction with certainty.

In my view, Minuk gave up the opportunity to try to prove alcohol consumption without any *quid* in return. He also gave up the opportunity, without any *quid* in return, to call a number of witnesses who made observations that, after the accident, Zenk smelled of liquor and had other symptoms consistent with impairment. He gave up the opportunity without any *quid* to argue that Zenk should have been sentenced to jail and not given a conditional sentence. He gave up the opportunity to seek a driving prohibition.

This was not a case which fell within Manitoba Department of Justice's policy directive (referred to above) that authorized a prosecutor to make an agreement "respecting pleas or sentence with a view to avoiding an unsuccessful prosecution." It was not a case "where the deficiencies in the available evidence create a substantial likelihood of acquittal." In my view, the agreement reached by Minuk with Wolson brought the administration of criminal justice into disrepute.

11. Was the agreement consistent with Manitoba Crown policy directives and acceptable prosecutorial standards for Minuk to stay the charges of criminal negligence causing death, impaired driving causing death and refusal to provide a breath sample

The directive, dated April 2001, provides as follows:

> "In the assessment of the evidence, a bare prima facie case is not enough: the evidence must demonstrate that there is a reasonable likelihood of conviction. This decision requires an evaluation of how strong the case is likely to be presented at trial. Crown Attorneys are to make this evaluation impartially and according to law.
>
> A proper assessment of the evidence will take into account such matters as the availability, competence and credibility of witnesses and their likely impression on the trier of fact, as well as the admissibility of evidence implicating the accused. Crown Attorneys should also consider any defences that are plainly open or have been indicated by the accused, and any other factors which could affect the likelihood of conviction."

Both Peck and Gover expressed the opinion that the decision to stay these charges was consistent with the Manitoba directive and within acceptable prosecutorial standards. As they both point out in their opinion, there were significant impediments because of the quality of the investigation in proving the impaired driving causing death and the refusal to provide a breath sample charges. Having reviewed the investigative evidence of the ESPPD and the PSU, I share their opinion. The charge of criminal negligence causing death imposed on the Crown the obligation to prove that Zenk showed a wanton and reckless disregard for the lives and safety of others on the highway. There would have had to be evidence of driving by Zenk that was such a marked and substantial departure from ordinary prudent standards of driving that it would have been said that his act or omissions showed a wanton and reckless disregard for the lives and safety of others on the highway. In the absence of such evidence, I agree that it was a reasonable exercise of discretion for Minuk to stay the charge of criminal negligence.

12. Did Minuk act independently of Manitoba Department of Justice in the exercise of his discretion to enter into a plea bargain

The Attorney General, as the chief law officer of the Crown, is answerable to the Manitoba Legislature for the conduct of prosecutions by his or her Crown counsel. It is therefore essential, in order to carry out the duties entrusted, that the Attorney General be apprised regularly of the prosecutions that are being conducted by his or her staff. The appointment of an independent special prosecutor places the Attorney General on the horns of a dilemma. While the Attorney General is answerable to the Legislature, he or she must also ensure that in obtaining up-to-date information on how special independent prosecutors are conducting their prosecutions, those enquires do not compromise the independence of the special prosecutor.

At the same time, it is clearly inconsistent with the duty and responsibility of an independent prosecutor to seek advice from, and the consent of, an employee of the Attorney General in their conduct of a prosecution. Since the purpose of appointing an independent special prosecutor is to ensure public confidence that the government will not interfere in the prosecution of a government employee (in this case a police officer employed by a municipal government), and that the prosecution will be independent of any government influence, seeking the consent of the Attorney General's department flies directly in the face of the purpose of the appointment. However, it is also recognized that independent special prosecutors need to have access to experienced counsel for consultation and advice, just as any government prosecutor has the opportunity to consult with the Crown or other colleagues in his or her department.

This dilemma faced the staff of the Attorney General. Minuk had been retained by Manitoba Department of Justice to conduct prosecutions where a prosecution required a prosecutor who was independent of them. As Minuk's client, Manitoba Department of Justice was entitled to an update from time to time of the status of the prosecutions Minuk was conducting. The staff needed that information so that they could report to and brief the Attorney General. Although an independent prosecutor, it was still incumbent upon Minuk to keep the Attorney General informed so the Attorney General could respond to questions raised in the Manitoba Legislature. The difficulty, however, arises where the independent prosecutor does more than merely report to the Attorney General. The difficulty arises where the independent prosecutor also seeks approval by the Attorney General's staff of the decisions that he has made.

During the course of the prosecution of Zenk, the question arose whether Minuk had crossed the line from merely keeping Manitoba Department of Justice advised, to actually seeking the approval of the Attorney General's staff of his conduct of the prosecution, including the plea bargained agreement he had made with Wolson. As already noted, the evidence revealed that Minuk had contact with Kaplan on 30 occasions, with Ireton on seven occasions and with Slough on nine occasions. Kaplan did not consider these contacts compromised the appearance of independence. He said:

> "In this particular case, Mr. Paciocco, the contacts of approximately 30 or 40 times, whether by e-mail or whether by phone, over a period of 32 months, my view is, no, it doesn't show any interference. The decision and the end result was always outside counsel and that's why we go to outside counsel."
> Evidence, p. 6644, l. 9-16

I am satisfied on the evidence that Minuk did not seek the consent or approval of Kaplan and Slough to his decision to plea bargain with Wolson. I am convinced that he spoke with them for the purpose of advising them what he intended to do and, to use his words "ensure that he was thinking clearly." I am also satisfied that Kaplan and Slough did not instruct Minuk on how they expected him to proceed in this matter, nor did they indicate to him that they consented to his entering into the plea bargain. I am further satisfied on the evidence that Minuk's contact with Kaplan and Slough throughout this prosecution was for the purposes of keeping them and, in turn, the Attorney General, advised of the status of the prosecution.

Although Minuk's e-mail (dated September 9, 2007) to Kaplan, attaching the proposed submissions he intended to make when court resumed on September 12, 2007 requests Kaplan to provide "any comment or suggestions," I am not convinced that it was sent to obtain Kaplan's approval. The memorandum (dated September 20, 2007) was in response to an e-mail request (dated September 19, 2007) from Slough to Minuk that he provide "the most complete information" so that he could do a briefing note for the Premier. There is no suggestion in that e-mail that the briefing be for any other reason.

Nevertheless, I must respectfully disagree with Kaplan when he says there has not been a public perception that Minuk sought his and Slough's approval as to his conduct of the prosecution and, in particular, his plea bargain with Wolson. It is inevitable that the public, if apprised of the nature, frequency and intensity of the contact between Minuk and Ministry officials, would consider that Minuk did not have the independence expected of an independent prosecutor. It is inevitable that the public would not consider Minuk independent, because he frequently sought their comments and suggestions.

An independent counsel cannot be considered independent of government if he is sending drafts of sentencing submissions to government counsel asking for their comments or suggestions. It is this public perception that has, in my view, led to the public's view that the prosecution of Zenk has not been conducted independently of government influence.

It is that public perception that can cause a lack of confidence that an independent prosecutor will be the willing tool of the government.

The independent prosecutor, for obvious reasons, does not have the opportunity to consult with and discuss his case with other colleagues. For example, Kaplan spoke of the conditional sentence policy within Manitoba Department of Justice:

> "A case conference is available to the line Crown Attorneys, where they have a matter of obviously import that they'd like to discuss, and usually it falls within the realm of murder, manslaughter, these type of cases primarily, to meet with, to request to meet for a case conference with that particular Crown, and hopefully with a bit of background, with that Crown, supervising senior Crown, and together with, on average, two directors from our office, set up the meeting and to discuss and receive the benefit of experience and input as far as decision making."
> Evidence, p. 6592-3, l. 17-25, l. 1-4

Commission counsel recommended that I recommend to the Minister of Justice the following amendment to Guideline No 5: COU: 1 "Appointment of Independent Counsel: February 2008" by replacing Terms and Condition of Appointment "d" with the following:

> "Independent prosecutors are required to keep the Department of Justice advised of all significant decisions that they propose to take in connection with the cases they are assigned. This is done solely to keep Department of Justice officials apprised of the status of the case, and to enable the Attorney general or the Deputy Attorney General to give direction as contemplated by "c' of this policy. Independent prosecutors should not consult with Department of Justice officials before making decisions but may secure legal assistance from Department of Justice officials who have special expertise in the area being prosecuted on strategies for implementing the decisions that have been taken by independent counsel. Should the legal advice rendered cause the independent counsel to change their strategy or position, this must be publicly disclosed on the Manitoba Department of Justice website after the trial judge has rendered a verdict in the case or the charge has been stayed. Subject to this policy, independent counsel has full access to all parties within, and all documents and information held by the Department of Justice for the Province of Manitoba. The Director of Regional Prosecutions and Education or any one designated shall facilitate contact between the departmental prosecutor and employees and the independent counsel and assist in accessing any documentation held by the Department of Justice."

I endorse this recommendation.

As already noted, independent special prosecutors need to have access to experienced counsel for consultation and advice just as any departmental prosecutor has the opportunity to consult with the Crown attorney or other colleagues in his or her department. It was recommended by Commission counsel that I also recommend to the Minister of Justice that:

> He establish a standing group of experienced criminal lawyers who are independent of Manitoba Department of Justice and who are able and prepared to provide advice and counsel to any independent prosecutor in making or implementing their decisions, and that when that system is established, to make relevant amendments to Guideline No. 5: Cou: 1 "Appointment of Independent Counsel.

I also endorse this recommendation.

In endorsing these recommendations, I am aware that Madam Justice Ruth Krindle conducted an extensive and thorough Canada-wide review of the Appointment of Independent Counsel on behalf of Manitoba Department of Justice and delivered her report on December 18, 2007. In that report, she stated (p. 14):

> (v) I understand that independent prosecutors meet periodically with the Director of Regional Prosecutions and Education to brief the Department on the progress of referrals, principally to assure the Department that none of the referrals is being neglected. This type of administrative meeting at the call of the Department is necessary and reasonable and in no way diminishes the independence of the prosecutor. However, the policy should acknowledge the fact of these meetings and state the administrative purpose in order that they are not misconstrued.

I am also aware that judge's recommendations have been incorporated into the February 2008 Guideline No. 5: Cou: 1 "Appointment of Independent Counsel." The two recommendations I have made to the Minister are intended to build on the recommendations made in her report.

PART D
COMPLIANCE WITH THE MANITOBA *VICTIMS' BILL OF RIGHTS*

1. The historical role of a victim in a prosecution

In preparing this historical note for me, I am indebted to Professor Alan Young (Young) for his helpful memorandum: Victims' Bills of Rights in Canada.

Prior to the Norman Conquest of England in 1066, Anglo-Saxon law placed the administration of criminal law in the hands of victims. From the seventh to the tenth century, criminal prosecutions were almost entirely private and partially motivated by the possibility of monetary compensation. An offender found guilty owed the victim a money payment, called the *bot*. In a homicide case, the offender was required to pay the victim's family a *wergild*, a monetary payment that depended upon the deceased's social status. Payment of monetary compensation could satisfy the desire for vengeance that was created by the wrongdoing of the aggressor, whether the injury or damage caused was intentional or accidental.
(Sir James Stephen, *History of the Criminal Law of England*, Volume 1, pp.51-74)

By the late tenth century, Anglo-Saxon kings began to require 12 nobles of a district to accuse and arrest those suspected of committing crimes in their locality. Penalties also began to change. The *bot* was now payable to the King or the church, or the community at large, rather than the family of the injured person. Two centuries later, during the reign of Henry II, the concept of "presentment" (by which leading men of a community were required to prepare a report of crimes committed in their community) had taken hold and was the ancestor of the grand jury proceedings that continued in Canada until the mid-twentieth century. Punishments also began to change. In the royal courts, hanging, fines payable to the King and forfeiture of property were the only punishment. However, presentments were almost exclusively confined to homicide and theft. Nearly all accusations of rape, mayhem, wounding, false imprisonment, assault and battery were still brought by private prosecutions called "appeals." This meant that although the legal sanction for crime was death or fines payable to the King, victims and their families could appeal and use the threat of legally imposed hanging or fines to induce compensatory monetary settlements.

By the fifteenth century, the grand jury assumed less and less an evidence gathering role and more a screening-body role. The juries assembled to try cases now began to rely more and more on evidence that the parties presented in court. Although all prosecutions were formally brought in the name of the Crown, victims assumed a predominant role in prosecutions with assistance from royal officials such as coroners and justices of the peace. However, by the nineteenth century, the growing problem of urban crime and the inefficiency of private prosecutions pressured governments to assume the conduct of public law enforcement and prosecutions. At that time, there were few benefits to victims other than the satisfaction of justice being done. By the mid-nineteenth century, most prosecutions were initiated by policeman.

It was during the reign of Henry II, that the concept of the King's peace began to take hold. At that point an act of aggression was no longer a personal thing between the victim and the offender. It was a breach of the King's peace – a crime against the state. Initially criminal matters and offences against public order were within the jurisdiction of local lords and local courts, while the King's court had jurisdiction over offences committed within the vicinity of the King himself. Eventually the King's peace was extended to the whole realm so that the King's court finally acquired a comprehensive jurisdiction.

As Professor Young writes:

> "In the historical evolution of the modern criminal process, the victim was transformed from prosecutor to mere witness, and the common law provided little or no procedural rights for witnesses."

He notes that the relegation of the victim to the role of witness has been supported by four fundamental principles which define the nature and function of an adversarial criminal process:

1. The prosecution is undertaken by the state, not the victim, in the name of Her Majesty the Queen.
2. The prosecutor is a quasi-judicial officer and a minister of justice, not the victim's lawyer.
3. The victim does not have standing in the criminal trial.
4. During the prosecution, the accused enjoys the presumption of innocence and due process.

Professor Young argues that case law has held that the prosecutor does not owe any fiduciary duty to the victim with respect to the exercise of his or her discretion. For example, he points to *K.P. v. Desrochers* (2000) 52 O.R.(3d) 742 (Ont.S.C.), where it was held:

> [27] The Attorney General represents society at large and the public interest. The Attorney General is not counsel to victim nor accused. The exercise of the Attorney General's discretion is reviewable in Parliament and the individual legislatures of each province. In that regard, the Attorney General occupies a special and time honoured position as chief law officer of the Crown, and answers critics within the precincts of Parliament and the legislatures. The Attorney General should not be required to answer critics in the Courts of law, save and except where the conduct complained of has been the result of the exercise of bad faith.

Professor Young also referred to *Levy* (2004), 184 C.C.C.(3d) (3d) 427 (Ont.S.C.J.). There the court held:

> [20] Restricting access to a criminal prosecution does not merely serve the Crown's convenience. Rather, it serves the public interest, protects the rights of the accused and furthers the proper administration of justice. Fairness to the accused demands that anyone who speaks in opposition to his or her

> interests in a criminal prosecution does so bearing the duties and restraints placed on Crown counsel: to be a minister of justice; to conduct the prosecution fairly; to refrain from inflammatory tactics and unsupportable positions: to make full disclosure – the list goes on.

The first recognition of the rights of victims or their families to express their feelings as victims about the conduct of an offender was the enactment in 1985 of section 722 of Canada's Criminal Code. Section 722, authorized a trial judge to permit a victim to file a victim impact statement, describing the harm done to, or loss suffered by, the victim arising from the commission of the offence. However, section 722 was only permissive and depended upon the discretion of the judge. In 1996, section 722 was finally amended to give the victim the absolute right to present a victim impact statement in writing or orally to the court. It also imposed a duty on the court to ensure that the victim was informed of his or her right to make this statement. Section 722(2) requires the victim impact statement to be in writing in the form and in accordance with the procedures established by a program designated for that purpose by the Lieutenant Governor in Council of the province in which the court is exercising its jurisdiction, and filed with the court.

2. Duties and obligations imposed upon a law enforcement agency by the Manitoba *Victims' Bill of Rights*

In 1985, the Province of Manitoba enacted *The Justice for Victims of Crime Act*. In 2001, the Manitoba Legislature passed *The Victims' Bill of Rights Act* (VBR) requiring the investigative and prosecutorial branches of Manitoba Department of Justice during the Crown's course of exercising their duties to consult with victims of certain crimes as defined by the act. The preamble to the bill recognizes that victims of crime have certain needs and the province has certain obligations towards providing those needs to victims. The preamble states:

> "WHEREAS victims of crimes and other offences have needs, concerns and interests that deserve consideration in addition to those of society as a whole;
> AND WHEREAS all victims should be treated with courtesy, compassion and respect;
> AND WHEREAS victims should have access to appropriate protection and assistance, and should be given information regarding the investigation, prosecution and disposition of crimes and other offences;
> AND WHEREAS it is in the public interest to give guidance and direction to persons employed in the justice system about the manner in which victims should be treated;
> AND WHEREAS persons employed in the justice system should consider the rights and views of victims in a manner that does not unreasonably delay or prejudice investigations or prosecutions, that is consistent with the law and the public interest, and that is reasonable in the circumstances of each case."

Section 1 of the bill defines a victim as the individual against whom an offence is committed, or the individual who was married to and living with the victim where the victim is deceased. Section 2 provides that the victim may obtain services from Manitoba

Department of Justice or an agency referred to in this part at any time by requesting services from Manitoba Department of Justice or agency or filing a general request for information with Manitoba Department of Justice or a law enforcement agency designated by the Minister.

Sections 3 to 11 recognize the obligation upon a law enforcement agency to provide certain information to a victim. This obligation includes the right to information from the agency about:

(a) the rights and remedies of victims under the act, including compensation for victims
(b) the agency's name, address and telephone number, and the number of its file about the offence
(c) a copy of any form approved by the Minister for obtaining services
(d) the form of victim impact statement designated under section 722 of the Criminal Code
(e) how to obtain information about
    (i) services available for victims, including medical, financial, housing, counselling, legal and emergency services and
    (ii) crime prevention and safety planning
(f) how a court order of restitution may be made for any loss, damage or bodily harm suffered as a result of an offence, where the amount is readily ascertainable
(g) how to obtain the return of any property taken as evidence by the agency in an investigation
(h) how to obtain information about the release from custody of a person charged with an offence and how to report a breach of a condition of release

Section 4 imposes an obligation upon the head of the law enforcement agency responsible for investigating the offence to ensure that, where reasonably possible and at an appropriate time, to consult with the victim on the use of pre-charge alternative measures to deal with a person alleged to have committed the offence, if alternative measures are reasonably possible in the matter. The agency must also attempt to consult about whether the person accused of the offence should be detained to ensure the safety and security of the victim or another person; and, if the accused person is released, whether he or she should be subject to any conditions.

Under section 7 of VBR, a victim is entitled, upon request, to the following information about the investigation of the offence, unless doing so could unreasonably delay or prejudice an investigation or prosecution or affect the safety or security of any person:

(a) the status of the investigation
(b) the name of any person charged with committing the offence, and whether the person is detained in custody
(c) if an accused person is released from custody by the agency, any conditions attached to the release
(d) a decision not to lay a charge, and reasons for the decision

A victim is also entitled to be interviewed by someone of the same gender in sexual offences (section 5); to confidentiality (section 6); to information about any breach of the accused's term of release or any escape by the accused from police custody (section 8); and the right to the return of property when the agency is satisfied it is no longer needed as evidence for the investigation or prosecution (section 9).

3. Contact by the East St. Paul liaison officer with the victim

Robert Taman, as the husband of Crystal Taman, was the victim (as defined by section 1 of the VBR). He learned about the accident from his daughter, Tara who called him on her cell phone at about 7:20 a.m. the morning of the accident. Tara and Kristin had been on their way to work and had come upon the accident. Graham took Tara's cell phone from her and told Robert the location of the accident.

Robert Taman drove to the scene of the accident in 10 minutes. Upon his arrival, Graham, who was standing by his cruiser, began speaking to him. Robert Taman noticed that his two daughters were in the back of the police cruiser waving frantically to him, and told Graham to let them out of the cruiser. Robert asked Graham if his wife was alive and where she was. Graham told him that she was alive and had been taken to the Concordia Hospital. Robert and his two daughters then got into Robert's automobile and set off in the direction of the hospital. Although the hospital is a short distance from the scene of the accident, Robert was directed by Graham to take a detour which led him through some back roads. It took him 40 to 45 minutes to reach the hospital. Robert, understandably, was angry and distraught because of the delay. He asked Tara to call her brother Jordan and other members of the family to meet them at the hospital. They also called Crystal's sister, Cory; Robert's brother, Randy; and Robert's parents, who were already at the hospital when Robert arrived.

Pedersen was the victim liaison officer for the Victims' Services Unit (VSU) of the ESPPD. She had learned about her obligations under the VBR from information given to her by Carter and had reviewed the material set out in the pamphlets provided by the Province. Bakema asked her to leave the accident scene and go to the Concordia Hospital to get particulars on both victims of the accident, Crystal Taman and Beattie. Pedersen arrived at the hospital at 8:48 a.m. and spoke to the Taman family. They wanted answers to what had happened. She told them that she would try to get the information and pass it on. She also told them that she could offer them information about where they could get grief counselling or other information they would want about the VSU.

Pedersen left the hospital and returned to the ESPPD station where she assisted in photographing and fingerprinting Zenk. Around 2:15 p.m. she went to the residence of Robert's parents with Justin Hall (Hall), a young person, who was a volunteer with the VSU. Pedersen and Hall were there for about an hour. It was the first time that Hall had attended as a VSU volunteer. Pedersen conceded that it was not the best time for Hall's first visit as a volunteer, but he was the only volunteer available at the time. Robert and the other members of the Taman family wanted to know what had happened and who had struck Crystal's vehicle. Pedersen told them that she did not know instead of telling them the truth – that she was not allowed to reveal details of the investigation until authorized to do so. While at the Taman residence, Pedersen provided the family with a couple of pamphlets and brochures dealing with the rights of victims.

At around 3:55 p.m. the following day, Pedersen called the Taman home and spoke to Robert's brother, Randy. She called again around 7:00 p.m. and spoke to Robert, explaining that charges would be laid but she did not know what they would be. She also updated him about their attempt to locate Crystal's cell phone which had gone missing. The following morning, she spoke by telephone to Jordan advising him that she was going to be away for a brief period of time and that he had the option of following up with someone else from the VSU. She detected that he was frustrated by the fact that the family had not been told much about the investigation. That was her last contact with the Taman family.

Robert Taman recalled that Pedersen's visit on February 25 was not very productive. The family was suffering from the emotional shock of the accident and wanted details of what had happened. Robert said that Pedersen was very abrupt and officer-like, and would not give him any details. Pedersen told him that she could not comment because the matter was under investigation. She gave them a couple of pamphlets on how to deal with grief. He felt like talking, not reading a pamphlet. Robert could not understand why Hall, whom he described as a young kid, was there. Robert felt that the presence of Pedersen and Hall was intrusive and disturbing "almost breaking through this family bond" and said it "would have been better if they didn't come at all."

The first details Robert Taman received about the accident were provided by Cecil Sveinson, Crystal Taman's cousin. On the day of the accident Cecil, a Winnipeg police officer, attended at the accident scene upon hearing of Crystal's death in order to perform a religious ceremony. While there, he spoke to Bakema, and learned certain details of the accident. He then attended the Taman home and advised the family that the vehicle that struck Crystal's car had been driven by an off-duty police officer and that alcohol was involved. A couple of days later, Cecil filled in the Taman family with more details. He said that it was a "shifter" meaning "an officer who, at the end of a shift, gets together with other officers to wind down and release their inner stress with a few hundred beers." He relayed that a friend, Ron Glass, told him a few days later that a buddy who was talking to the tow-truck driver, was told that the truck "just reeked of alcohol" and he was sure that "this guy was drunk."

Robert Taman was never told by any member of ESPPD about what happened until March 5, 2005 when Bakema and Carter met with his family and Crystal's family at his in-laws' home. At that meeting, Bakema and Carter explained that they were going to have a press conference announcing that the driver of the vehicle that struck Crystal would be charged with four offences: dangerous driving causing death, impaired driving, refusing to give a breath sample and criminal negligence causing death. This was the first time that they learned the name of the driver. Bakema tried to console them by saying "there is nothing to worry about, we got him."

Robert remembered that Bakema said that "he is going to jail." However, Bakema said that he could only tell them about the charges but "nothing about the actual scene." Robert felt that they should have been given details to "help put together the puzzle of why Crystal had died that day." He felt that details of the scene would have been helpful. There was no explanation why they could not be given more information about what had happened. He said that he and his family never discovered what had happened until two months before this Inquiry began.

Robert Taman felt that the police should have told him as much as he and his family were allowed to know and "then to go through the details of everything that is going on in the process so that we can actually understand it."

He said: "there is not enough information given, and when the information comes out, there are not enough details or explanations to actually help us understand." Robert could not understand how somebody like Zenk could kill somebody and "then be out and walking on the street" and to be able to go into a bar inside of four hours. Robert did not feel that ESPPD gave him information as to his rights and remedies under the VBR.

4. Whether there was compliance by the East St. Paul liaison officer with *The Victims' Bill of Rights*

The ESPPD was the law enforcement agency as defined in the VBR. Section 3 of the VBR imposed a duty upon the head of the law enforcement agency to ensure that the agency provided Robert Taman with the information listed in that section. Section 4 imposed a duty on the agency to consult with Robert about Zenk's terms of release. Section 7 imposed a duty upon the agency to give the Robert information about the investigation. Section 11 imposed a duty upon the agency to give Robert the name, address and telephone number of the prosecutor.

It is clear from the evidence that the ESPPD failed to comply with the provisions of the VBR. Robert was never given an application form to register as a victim. (section 2(1)). He was never given information about the rights and remedies of victims under the VBR (section 3(a)). The right to file a victim impact statement was not explained to him. (section 3(d)).

Robert was never given information about services available for victims (section 3(e)(i) or how to obtain information about the release of Zenk (section 3(e)(ii)(h). He was never consulted about Zenk's release from custody (section 4(b)). He was never told of his right to information about the status of the investigation. (section 7). He was not given the name and contact number of the prosecutor (section 11). It is easy to understand why he felt that he and his family were not treated with courtesy, respect or compassion as stated in the preamble of the VBR.

5. Duty and obligations of the prosecution to victims under The Manitoba *Victims' Bill of Rights*

Sections 12 to 14 of the VBR impose an obligation upon the director of Prosecutions to ensure that a victim, *who requests information about the prosecution of an accused*, is given certain information. Section 12 provides that a victim is entitled to information about:

(a) the court process, including the role of the victim, prosecutor and other persons involved in the process
(b) the right of the victim, and a person providing support to the victim, to be present during any court proceeding relating to the alleged offence, subject to any court order of exclusion
(c) how to obtain the dates, times and places of proceedings relating to a prosecution
(d) the process for entering a plea of guilty or not guilty, including the possibility of discussions between the Crown attorney and an accused person, or his or her legal counsel, on a resolution of the charge
(e) the process for sentencing a person convicted of an offence
(f) the right to file a victim impact statement, and to add to it any time before the sentencing of the accused person
(g) how to obtain assistance to complete a victim impact statement
(h) the use of victim impact statements and pre-sentence reports in sentencing

Where the victim requests information about the status of a prosecution, section 13 imposes an obligation upon the director of Prosecutions to provide the following information, unless doing so could unreasonably delay or prejudice an investigation or prosecution or affect the safety or security of any person:

(a) the charge laid against the accused person
(b) the name, address and telephone number of the office or Crown attorney that has conduct of the case
(c) the date, time and place of a proceeding that relates to the prosecution
and is likely to affect its outcome, including a preliminary hearing, trial and sentencing hearing
(d) the outcome of the prosecution

Finally, and most importantly for the purpose of this Inquiry, section14 requires the director of Prosecutions, at the victim's request, to *consult* the victim, if it is reasonably possible to do so without unreasonably delaying or prejudicing an investigation or prosecution on:

(a) a decision on whether to lay a charge
(b) staying the charge against the accused person
(c) any agreement relating to a disposition of the charge
(d) any position taken by the Crown in respect of sentencing, if the accused person is found guilty

6. Contact by the Prosecution liaison officer with the victim

Lesley McCorrister (McCorrister) was one of the two Winnipeg VBR workers, from 2001 to January 2006. She was assigned by the director of Prosecutions to provide services on behalf of the prosecution to the Taman family. The other victims' rights worker was Monica Dyck (Dyck), who provided services when McCorrister was on vacation. McCorrister described her work as a messenger between the Crown attorney and the family or victim.

It was the practice of McCorrister and Dyck to check daily through the prosecutions records information management system (PRISM) to find out whether there had been any incidents tagged under the VBR. She and Dyck would pull the report and share the cases. They initiated contact with a form letter that comes with information sheets about the VBR whenever there was a prosecution. Included as well was information for the victim impact program. It was McCorrister's responsibility to explain to victims her role and the role of the prosecutor; inform the victims of court dates; meet with victims in her office on a court date; walk the victims to the courtroom; and explain the process to them, including where they were to sit during the hearing. McCorrister would also be the go-between to schedule meetings between the victims and the Crown attorney, and attend the meeting if she could. She understood that victims want information about the facts behind the case; about delays in the case; about resolutions and how the case might end; whether there might be a plea bargain or a trial; and whether there is going to be a conviction. She said that victims do not know how the system works; what is going to happen in the courtroom; or what everybody's role is; and that victims are also emotional because of their tragic loss.

McCorrister's first communication with Robert Taman was a letter she sent to him on March 4, 2005. Included in that letter were fact sheets: *The Victims' Bill of Rights Overview, Understanding the Victims' Bill of Rights, Manitoba Victim Impact Statement and The Role of the Prosecutions Division.* Her first contact with Robert was when he called her on March 17, 2005 and told her that he had received the VBR information that she had sent him. She explained what the VBR was, what she did and how she could assist him.

McCorrister advised Robert that Zenk's first court appearance was March 30, 2005 and that it was a waste of time for him to attend. Robert told her that he would like to be in contact with her on a bi-weekly basis. He testified that he understood from their conversation that she was to be his source of information and that she would provide him with updates bi-weekly.

McCorrister understood from their conversation that she would not be contacting Robert bi-weekly unless she had something to report, although it would have been open for him to call her if he wanted information from her. Robert provided her with his cell phone number to contact him. He said that he had to call her periodically for updates.

On March 18, McCorrister received a call from Jordan Taman inquiring why her letter of March 4 did not refer to a charge of refusing a breathalyzer sample. She explained that it was an error. She told him that the case could take two years before any resolution. On March 31, she received a call from Tara Taman expressing her concern about the delay in the proceedings and inquiring whether the fact that Zenk was a police officer would have an impact on the case.

McCorrister explained that the delay was a normal process in the court system. Robert called McCorrister on April 5 inquiring how soon she needed his victim impact statement. She told him that statements were used only at sentencing hearings. On May 26, McCorrister spoke to Robert about his concern whether a plea bargain would take place without his knowledge. She told him that the Crown attorneys were good at keeping families informed about talks taking place with the defence.

Zenk's first appearance on March 30 was adjourned to April 27. On that date, a preliminary inquiry was set for June 5, 2006.

On June 1, 2005, McCorrister sent Robert Taman a letter advising him that the preliminary inquiry had been again adjourned – to June 16, 2006. Unfortunately, this letter had been sent to his old address and had been returned. On June 1, 2005, Robert called her. She told him about the new date and said that she would be in touch with him in April to arrange a meeting with the Crown. The next time she spoke to Robert was 11 months later on May 1, 2006 when he called her. Robert said that he wanted to meet the Crown. He told her that he had heard that his in-laws had met with Minuk, the independent prosecutor. He was upset because he felt that as the registered victim, he should have been contacted first and felt that he had been kept out of the loop. She then arranged for a meeting with Minuk on May 3 and called Robert to tell him. Robert told her that he wanted her to go with him to the meeting.

7. Whether there was compliance by the liaison officer with *The Victims' Bill of Rights*

I am satisfied that McCorrister and Dyck made genuine efforts to comply with the responsibilities imposed on them under the VBR, although some communication difficulties arose when Robert changed his address and telephone numbers were lost. McCorrister attended most meetings with Minuk, except, unfortunately, the one where resolution of the charges was discussed. She advised them of court dates and attended court with them and showed them where they were to sit. Both Jordan and Tara said that McCorrister treated the family with respect, courtesy and professionalism. Kristin said that she was always extremely nice and pleasant to be around. Robert described McCorrister as a good-hearted woman and said that he had respect for her. His main complaint was this:

> "I like Lesley, I think that she does a good job, to the best of her ability, but I just don't believe she has the tools to be an independent person dealing with a victim. Somebody who is just an extension of the prosecution, is the prosecution. And if there is a situation that comes up with the prosecution that Lesley has to deal with, she doesn't deal with it as an independent, she deals with it like she is the prosecution. And that's difficult. And I sympathize with her and her job, but in the end I have to say no. And I am saddened to say that, because Lesley I believe is a good person, but I have to say no."
>
> Q. Sir in fairness to Ms. McCorrister, just so we are clear, when you talk about her not having the tools, do you mean her job function doesn't allow her to do what you think needs to be done by a victim support worker, or are you commenting on her ability to discharge the function that she has?
> A. No, I am commenting on what she is allowed to do.
> Evidence, p. 211-2, l. 20-25, 1-8

Robert had not been given any assistance in preparing his victim impact statement. He made the following comments about the victim impact statement documents that had been given to him by McCorrister:

> Q. Did you find the document clear and helpful?
> A. That's a difficult question to answer. If somebody going through or not going through an emotional time like we were, if somebody was just a regular person, picked up the document to read it, they might find it extremely clear and, yeah, it's not a problem. But when you are in an emotional state and you have got to write something of this nature, things aren't quite as clear all of the time. And so I wouldn't find it that clear at that time, no.
> Q. Would you have any advice or recommendations to the crime victim service workers about how to handle that situation?
> A. I would suggest a lot more communication with the victims, and a definite layout of writing the statement, and possibly even a visit, either in their office or your home. It is not like it is going to take four or five hours, just you have to be there to sort of present the guideline. None of this takes a long time, just a matter of explaining it properly, so just better communication.
> Evidence, p. 210-11, l. 16-25, 1-14

8. Contact by the independent prosecutor with the victim

On May 3, 2006, Robert and Jordan Taman and McCorrister met with Minuk at his office. Robert expressed concern that he was not the first member of the family to meet with Minuk. He testified that Minuk told him that he had met with his father and mother in-law "on a matter not related to the charge." Minuk denied this and said that he told them he had met with them because of a request by the Victims' Service Unit. However, McCorrister confirmed Robert's evidence in her memo to PRISM and I accept Robert's testimony on this issue.

Robert testified that Minuk told them that the issue of sentencing was not consistent and, quite often, any jail time was spent as house arrest. Minuk denied discussing specifics of sentencing. However, McCorrister also confirmed Robert's testimony in a memo to PRISM and I accept Robert's evidence on this issue.

Robert raised the issue of the victim impact statements and was told that they were only read at sentencing. Minuk told him that the preliminary inquiry would show any weaknesses or strength in the case. McCorrister said that she felt that Robert was having difficulty understanding how anybody could spend jail time in his own house.

Minuk told McCorrister that he wanted to meet with the Tamans again. On May 26, she called Robert to tell him that she had arranged a second meeting on May 29, 2006 with Minuk. At the meeting, Minuk told the Tamans that there were problems with the case, that he was sending out his investigators to double check his information and that he would have to delay the preliminary inquiry.

Robert said that he understood that the delay was "to close some holes" in the prosecution of Zenk, but he was not told what those holes were. He was hoping that

Minuk was going to do a proper investigation, find the information and get the matter back into court. Minuk did not inform Robert of the true nature of the problems – that it was the RCMP investigation into the conduct of Bakema. The issue of Robert's in-laws also came up at that meeting. Minuk told Robert that he was only listening to his in-laws "rail against the system" and that he was frustrated with them. Minuk said that "they were crazy" and was not going to meet with them again.

The following day, McCorrister called Robert Taman and advised him that it was going to be a year before the case was heard. This was followed by a letter advising him that the new court was July 16, 2007. However, the letter was returned because Robert had moved. She called October 18, 2006 to straighten out the matter of his new address and she entered the address in her PRISM system.

The next contact between McCorrister and Robert was on June 12, 2007, eight months later. Robert called her to find out if the July 16, 2007 preliminary inquiry date was still on. He was concerned whether there was going to be graphic pathology evidence and how that might affect his children. He was also concerned that the Crown and defence counsel might be plea bargaining. She suggested that he meet with Minuk to discuss the matter and arranged a meeting for the following day.

Robert and Jordan Taman met Minuk at his office on July 13, 2007. McCorrister had another engagement and was not present. Robert testified that Minuk told them that he was going to have to stay the charges of refusal to provide a breath sample and impaired driving because the East St. Paul Police had "screwed up the investigation."

Robert told Minuk: "I believe East St. Paul screwed up the investigation and I think everybody screwed up right up into your office." Minuk responded: "Sir, I suggest you choose your words carefully in this office." Minuk also told him that it was a good thing that "we are going to go with dangerous driving because that's the most serious of all the charges."

Robert disagreed, saying that he understood that impaired driving causing death was the most serious of all charges and that having alcohol with the charges made it a serious offence. Minuk repeated that dangerous driving was the most serious charge. Robert said that Minuk assured them that he could prove the dangerous driving charge but not the impaired driving charge. Robert told him he would rather fight and lose: "I would rather him just go to court, and if he is found not guilty and walks out a free man, than just dropping the charges."

There was also discussion about the sentence. Robert said that Minuk produced a three-ring binder with cases in it and read some of the decisions. Minuk told him that he was looking at two years less a day conditional sentence. Robert said he told Minuk: "so he is going to go home and sit on his couch and that's his punishment." Minuk told him "…oh, no, it is a very tough sentence." Robert was asked what, in his view, was the appropriate sentence and replied that if alcohol was involved, Zenk should go to jail for three to five years. Minuk assured him that it was not a plea bargain.

Robert Taman said that he, Tara, Kristin and Jordan met Minuk on July 16, 2007 outside the courthouse and were told by Minuk that the preliminary inquiry was being adjourned to the next day. McCorrister met Tara, Kristin and Jordan and she took them to the courtroom. The next day, the Tamans again met Minuk outside the courthouse. Minuk advised them that Zenk was pleading guilty to dangerous driving causing death. They were shocked. Minuk told them that if he was Zenk's lawyer, he would have gotten him off on all charges. Jordan was confused because Minuk had told them in his office on July 13 that he could absolutely prove the dangerous driving charge. Jordan again asked Minuk whether it was a plea bargain and was told that it was not.

Zenk was arraigned on the charge of dangerous driving causing death, pleaded guilty and Minuk stayed the three other charges. The case was then adjourned until August 22 for sentencing. Since August 22 was Crystal's birthday, Robert initially wanted to change the date for sentencing. He felt that it would be hard for him and his children to stand up and read their victim impact statements. However, he was concerned that it would only cause further delay, and after speaking with his children, it was decided that they would go ahead on August 22.

On August 22, the Tamans met Minuk outside the courtroom. Minuk told them that "the defence and I are recommending jointly that Zenk will plead guilty to dangerous driving causing death, and we are recommending two years less a day conditional sentence." Robert said that he was flabbergasted. He asked Minuk if there was any place on the document that Minuk had in his hand that he could write that the family did not agree. Minuk replied "no" and turned and walked away. Robert was astounded and felt insulted during the Inquiry when presented with a memo dated July 18 prepared by Wolson which read:

> "There is a militant father and mother of the deceased. The husband and the children are on side. Having said all of that, we will meet with Judge Wyant and discuss these issues with him."

On August 27, 2007, Robert Taman called McCorrister and expressed his anger about the hearing because all of the facts had not been read in and that Minuk had not sought a heavier sentence. She offered to call Minuk and set up a meeting. McCorrister called Minuk who said that he would meet with Robert but not until after the sentencing was completed. She communicated this to Robert in a telephone conversation on August 28.

Chief Judge Wyant had called counsel back for further submissions on September 12. Robert said that he was shocked when he heard Wolson advise the judge that his client was not agreeing that he had alcohol in his blood at the time of the accident. Chief Judge Wyant asked Minuk whether he was going to lead evidence of alcohol consumption. Minuk asked for a short adjournment and left the courtroom. Upon his return, he told the Taman family that he had requested the adjournment so that he could use the washroom. When court resumed, Minuk told Chief Judge Wyant that he was not leading any evidence of alcohol consumption.

After court, Robert Taman asked Minuk why he did not bring up anything to do with the crime scene. Minuk told him "if you really want to know about the crime scene, ask your daughters, they were there, they know everything. They are the ace up your sleeve." He didn't know what Minuk was talking about. He testified that Minuk said "this all with a smile on his face, like I would be happy."

On the day of sentencing, Robert Taman recalled hearing the judge explain why he had to go along with the recommended sentence. After court adjourned, he and his children waited about five minutes to speak to Minuk who remained by the counsel table. The sheriff's officer then came over to them and told them that they would have to leave the courtroom, which they did. Robert said that while they were waiting for Minuk in the hallway, the sheriff's officer opened the courtroom door twice and looked out in the hallway as if he was looking for somebody. Later, he received a telephone call from a reporter that the sheriff officer had exited Zenk through the back door because of possible threats from the family. He was extremely insulted that "the killer is being lead through the back door and the law-abiding citizens are the ones being accused of being threatening."

Robert said that he presented a victim impact statement on August 22 even though he knew it was going to be a joint recommendation. He did so out of respect for Crystal. He felt that everything up to this time had been about the laws and that Crystal had been forgotten. However, his family were determined not to forget her and stood up and read aloud their statement.

Robert was asked whether he felt that victims' service had fulfilled its obligation under the VBR to make every reasonable effort to tell him about important events and consult with him at various stages during the prosecution. He testified that he felt that he was not adequately informed about court dates because the service kept calling him at his old telephone number and sending letters to his old address although he had given them his new number and new address. Robert said he did not feel that he was given a full explanation of the VBR although he was given some information. It was his recommendation that the victims' services have more communication with victims, and a definite, defined layout of writing the statement, and possibly even a visit. He felt that victim service workers should deal with victims independently and not as an extension of the prosecution.

Nevertheless, within the limited framework of the job functions, he felt that McCorrister treated him in a decent way. Similar comments were echoed by Tara, Kristin and Jordan about McCorrister. They felt that she was polite, respectful and seemed to understand their position. However, they all felt that Minuk had not treated them with courtesy, compassion and respect. Robert summed up his view of the VBR in these words: "It is difficult when you don't trust your prosecutor, and your victims' services is the extension of your prosecution."

Sveinn Sveinson (Sveinn) and his wife Victoria Sveinson (Victoria) are the parents of Crystal Taman. Although they are not defined as victims under the VBR, it is important to relate their involvement in this matter. Sveinn described their family as a very close one. He said that he worked in the justice system as a correctional officer and had spent the last 13 years before his retirement managing the laundry department at Stony Mountain Prison.

He and Victoria were on vacation in Victoria, British Columbia, visiting Victoria's sister when he received an early morning telephone call advising that Crystal had been killed in an accident. Victoria, who was sitting on the bed, knew something was wrong because of the conversation and he knew that he would have difficulty telling her what had happened. Victoria, who was very close to her daughters, Crystal and Cory, was devastated by the news. The Sveinsons drove their car to the mainland and arranged to fly home, arriving in Winnipeg at around 11:00 p.m. where they were met by members of the family.

Sveinn said that he spent the next two days trying to see Crystal but was "sloughed off" by the Medical Examiner's Office. Finally, he and his wife were permitted to see her. He said that when he asked to see the autopsy report, he was told that it was only available to the Crown and defence and that he could not see the report until the case was over. Sveinn said that he had five contacts with ESPPD to find out court dates, who the prosecutor was and how the investigation was progressing. He was told that the RCMP were heavily involved in the investigation and the Crown prosecutor was also investigating. On August 16, 2005, he met with Carter who gave him Minuk's name and number and supplied him with victim impact statement forms. He found ESPPD very polite but he really didn't get much information from them.

The Sveinson's became concerned about the case very early on. On August 31, 2005, wrote a letter to the Provincial Minister of Justice, Gordon McIntosh, expressing concern about the justice system and another letter date April 3, 2006 to the Federal Minister, Vic Toews, expressing the same concern.

Sveinn said that he and his wife had three meetings with Minuk. The first was on October 3, 2005 as a result of a telephone call he made to Minuk on September 28. Minuk said that he was wondering how to get in contact with them. Minuk said he understood that his wife had written to the Minister of Justice. Victoria testified that Minuk said that he had not read the letter. Minuk denied this and said that he had the letter in front of him. Sveinn said that they discussed the investigation but Minuk denied this. Sveinn said that Minuk was already talking about a conditional sentence and said it was the law.

Minuk said that he was attempting to prepare them for the outcome. Sveinn told Minuk: "It was not the law, only part of the law, and so was a 14-year sentence." Minuk also said: "Everybody who goes out for supper has a bottle of wine and drives home." Sveinn said that Minuk was already condoning breaking the law and it didn't make sense to him. He also felt that he was being talked down to by Minuk. Minuk told them that he couldn't divulge anything; that there were lots of witnesses being interviewed; and that he had been appointed prosecutor to avoid the appearance of conflict. After the meeting, Sveinn was skeptical, but hopeful, about the prosecution of Zenk.

At a second meeting with Minuk, on May 25, 2006, Sveinn said that he and his wife were told that two weeks had been set aside for the preliminary inquiry. Minuk also said that he was concerned about proving the dangerous driving charge because they needed evidence to prove how fast he was driving and they had a specialist from the RCMP conducting tests.

Minuk denied telling the Sveinsons that he would have problems proving dangerous driving. However, Sveinn's testimony was consistent with the testimony of Bukowski, Shaw and Beattie who said that after Zenk pleaded guilty on July 17, 2007, Minuk told them that he "was surprised and could have gotten him off." I accept Sveinn's testimony.

At a third meeting on May 31, Sveinn said that Minuk told them that there was going to be a two-to-six month adjournment of the preliminary inquiry. After that meeting, he and his wife prepared a letter to Minuk expressing their frustration with the prosecution and the delay in the proceedings. He said that the letter was not sent until December 14, six months later, because they hoped that in the meantime Minuk would look into their concerns. He received no reply from Minuk.

Sveinn testified that during the court proceedings on July 16, 2007, Minuk came over to him and his wife and daughter and said that Zenk was going to plead guilty to dangerous driving and that the case had been adjourned to the next day to be heard by Chief Judge Wyant. The next day, Sveinn heard Minuk tell Chief Judge Wyant that Zenk was pleading guilty to dangerous driving causing death and the other charges were being dropped. The plea did not make sense to Sveinn considering that he had been told by Bakema that it was a "slam dunk." After the hearing, Sveinn approached Minuk in the hallway and asked him whether he was now going to plea bargain for sentence after giving away three charges. He said that Minuk replied: "Oh, no, that's the judge's job. He is the one who decides sentence."

On August 22, 2007, Sveinn, Victoria, their daughter, son-in-law and grandchildren attended court. Victoria read her victim impact statement. He did not read his statement out of respect for his wife, who is close to their daughters. Sveinn felt that Victoria would get a benefit from reading it and voicing, in her own words, how she felt. He said that when she mentioned alcohol, Chief Judge Wyant asked the lawyers why they had not mentioned it. He said that the lawyers became concerned and told the judge to disregard it. Sveinn said when joint submissions were then made for a conditional sentence, he and his wife felt that they had been lied to by Minuk. Victoria then wrote a letter to the Attorney General on August 25, 2007 complaining about Minuk's handling of the case and stating that Minuk had told them that the dangerous driving offence was more serious than the impaired driving offence and would bring a greater sentence. The Sveinsons were hoping that something could be done before it was too late. Sveinn said that at the Sept 12 hearing, the issue of alcohol came up but Wolson said that the accident was caused by a momentary lapse of attention; that there was no proof that he had been drinking; and that there were no drinking charges. Sveinn said that Minuk agreed and said that it was a joint submission.

The Sveinsons did not receive a response to their letter to the Attorney General. They sent a second letter on September 12, 2007 and a third on October 1, 2007. The Sveinsons then received a letter (dated October 5, 2007) from Slough, responding to their complaints about Minuk. The Sveinsons met with the Attorney General on October 5 who listened to their complaints. They were hoping that the proceedings could be stopped before it was too late. A fourth letter dated October 15, 2007 was sent to the Attorney General complaining about the prosecution. A letter dated September 27, 2007 was sent to the Law Society of Manitoba complaining of Minuk's conduct of the prosecution. The Law Society replied, indicating that they did not have jurisdiction to remove counsel on any given matter. The Sveinsons attended the sentencing decision by Chief Judge Wyant on October 29, 2007 and were deeply devastated by the outcome. Sveinn looked for Minuk to speak to him after the decision was rendered, but Minuk had disappeared.

Sveinn expressed frustration with the fact that he and his wife were not considered victims: "Parents and siblings, without question, are victims. Their hearts get ripped out just like that of a husband and wife." He felt that the law concerning victims must change. Victoria said the she was also deeply distressed by the administration of justice and what had happened in this case. They had to drag out any information they received, felt put off, and, when they finally got to the court case, there was a deal. Victoria said: "To me, there was absolutely nothing." She felt "betrayed by a system that is supposed to provide justice, supposed to protect the public, and it doesn't."

Victoria felt that it was immoral that parents and siblings are not named as victims. As she said: "I'm Crystal's mother, my husband and I are her parents, that's a biological fact, it will never change." She felt that a policeman should be required to take a breathalyzer. She had expressed this earlier to Bakema, who had said that they had a lot of other evidence to prove impairment, otherwise they would not have laid those charges. She was happy at the time to hear that they did have evidence. She did not question what the evidence was and took Bakema at his word.

Victoria said at that the meeting with Minuk on October 3, 2005, they were made to made to feel that they had no right to information about the progress of the prosecution. Minuk told them that he had not read the letter they had sent to the Minister of Justice. She also confirmed that Minuk said that a conditional sentence was the law. When Victoria told Minuk that they would have to work hard to get a longer sentence than two years less a day, she said that he looked the other way. When she challenged his information, he reacted as if she did not know what she was talking about.

At their second meeting, Minuk told them told the Sveinsons that he needed some time to plug holes and the adjournment would be two to six months. At their last meeting, the charge of dangerous driving was discussed. Minuk said that it would be difficult to prove dangerous driving and gave an example that the driver could have been momentarily distracted by reaching down to pick up a CD. Minuk also said that they couldn't tell the speed Zenk was driving because there were no skid marks.

Victoria said that at the July 16, 2007 hearing, Minuk came into court and told them that Zenk was going to plead to dangerous driving. Minuk then told the presiding judge that Zenk was going to plead guilty to dangerous driving because the Crown had 33 witnesses scaled down to 12 for the preliminary inquiry. She felt that now there would be no difficulty proving dangerous driving as Minuk had said. Later that day, she phoned Minuk to inquire about the other charges and was told they were stayed. She told him it sounded like a plea bargain, but he would not admit it. She asked Minuk if he was going to bargain the sentence, but he would not give her an answer. She asked him about putting in a victim impact statement and Minuk said he would get McCorrister to call her.

After Zenk pleaded guilty on July 17, McCorrister gave Victoria copies of a victim impact statement form. At the hearing on August 22, Victoria heard Minuk mention that Zenk had something to drink, but was not drunk. She felt that Minuk had not really prosecuted the case; was surprised to hear him offer a conditional sentence; and never heard any explanation why he stayed the other charges. She felt that it was either a cover-up or incompetence on Minuk's part. She said that she had no understanding of what had taken place.

Victoria was frustrated in preparing her victim impact statement because of the many things she could not say. She said that she prepared one because she felt that it "may be the only say I will ever get." She spoke to Dyck on August 1, 2007 who told her about the guidelines and parameters of a victim impact statement. She prepared the statement and dropped it off a Minuk's office. On August 15, she received a letter from Minuk indicating that he had highlighted portions of her statement that did not meet the requirements for victim impact statements. He stated that once she deleted them, he would file it with the court. Included in the letter was a picture of Crystal and a picture of her vehicle after the collision that she wanted to file with her statement. Victoria called Minuk and asked him for an explanation about why he had made deletions. She said that she was not satisfied with his explanation, but realized that she had no choice in the matter. Notwithstanding her disappointments, she felt that it was worthwhile for her to read out her statement in court: "Just to be able to express how you have been feeling, pretty much like writing in the diary perhaps, or maybe even talking to a psychiatrist, it gives you an out." It was also important to make the judge understand who Crystal was and what she meant to her.

Victoria was also frustrated with the way victims are treated. She expressed herself this way:

> "The victim is pushed aside somewhere under the carpet, she is a number, nobody sees her. And only the defendant is there to get all of the attention, poor guy, we have to look after him now. That's the way I see our justice system, and it's not very good."
> Evidence, p. 711, l. 14-19

Dyck said that she took a call from Victoria on August 1, 2007 while McCorrister was away on holidays. She spoke to Victoria about the guidelines and parameters of a victim impact statement. She later had contact with Victoria about putting photographs in the statement. Dyck testified that she did not understand why photographs were not permitted to be presented to the court with a victim impact statement.

9. Whether there was compliance by the independent prosecutor with *The Victims' Bill of Rights*

I am satisfied that Minuk failed to comply with the provisions of *The Victims' Bill of Rights*. Section 12, 13 and 14 of the bill impose a duty upon the prosecutor to provide the victim with the status of the prosecution. Implicit in that duty is the obligation to provide accurate information to the victim and his or her family. Minuk provided inaccurate information to Robert and his family. He told them that the purpose of the RCMP investigation was to "fill the holes" in his case, when it was not. He led them to believe that it was the RCMP investigation that was the reason why the preliminary inquiry had to be adjourned. That information was inaccurate. He told them that a dangerous driving charge causing death was a more serious charge than impaired driving causing death. That information was inaccurate.

Minuk told the family that he was not plea bargaining with Wolson. That information was not true. He told them that it was up to Chief Judge Wyant to decide the question of sentence. That information was accurate but misleading. It is true that the final decision as to sentence is a matter within the domain of a the judge but as noted in Part C, the Manitoba Court of Appeal made it clear in the *Sinclair* case that a trial judge should not depart from a joint recommendation unless the proposed sentence would bring the administration of justice into disrepute or would be contrary to the public interest. Finally, Minuk misrepresented to the court and Wolson that the Taman family were onside with the plea bargain when, in fact, he knew that they were not.

It is important to recognize and acknowledge that Minuk did spend some time with the Tamans and with the Sveinsons, although he had no obligation under the VBR to meet with the Sveinson family. There is no suggestion that he intended to be anything other than courteous and respectful. Moreover, it is clear that his task was not an easy one considering that the Tamans and the Sveinsons were quite emotional and, at times, probably difficult to deal with. However, in accepting the retainer to prosecute Zenk, he also accepted the duty and responsibility to comply with the VBR, and all that such responsibility entails dealing with a victim who has suffered such a terrible loss. The question, therefore, is whether his meetings with the Tamans and the Sveinsons were productive in the sense that he provided them with the information that the VBR required him to provide.

I agree with Mr. Clifford that Minuk failed in fulfilling his obligations under the VBR. Why did Minuk provide false and inaccurate information? In my view, he did so because he realized from his discussions with the Tamans and the Sveinsons that they would not accept his assessment that it was unlikely that he could prove the three charges that he eventually stayed. Why else would he say that dangerous driving was the most serious offence? Minuk also realized that the family wanted Zenk to go to jail and that there was a possibility that Zenk might be given a conditional sentence. Why else would he tell them that he had not plea bargained? Why else would he have told them that the sentence was up to the judge when he knew that Chief Judge Wyant would have to follow the joint recommendation unless he concluded that it would bring the administration of justice into disrepute or would be contrary to the public interest.

10. Recommendations

Commission counsel recommended that I make the following recommendation to the Minister of Justice:

> "That he take steps to promote an amendment to *The Victims' Bill of Rights* that would enable parents and children of a deceased victim to enjoy the informational rights provided for in *The Victims' Bill of Rights* in cases where the parents or

> children request access to those rights on the basis that the spouse of the victim may be unable or unwilling to disseminate information to them."

The evidence of Sveinn and Victoria was so compelling and persuasive that such a recommendation should be made. I concur in the recommendation.

The second recommendation of Commission counsel was that I recommend to the Minister of Justice:

> "That he take steps to promote an amendment to section 14 of *The Victims' Bill of Rights* that would replace the overreaching promise to "consult" victims on the matters enumerated in that provision, with the right of victims to have their views "listened to and seriously considered."

This recommendation arises out of testimony by witnesses who have expertise in the bill and have worked with victims. Jacqueline St. Hill (St. Hill) is one of the Directors of Prosecutions and responsible for Winnipeg Prosecutions. She testified that the term "consultation" is problematic because:

> "I think that's the area where we get most concerns being expressed by victims about their case and about the communication. And people either think that they can direct the prosecution, and the Crown is to do what they say, or they hear what is being said and they don't like it. And it may affect the reality of the case, but it doesn't take away from the fact that the obligation has been met in terms of provision of information, the opportunity to discuss, what does it mean, why, to have the explanation given as to why the case is going in a particular direction. But at the end of the day, it may not meet what the victim is looking for. And as a result it does cause grief for everyone, because the Crown has to deal with it as well, if someone is very upset about why things are happening. So it is a troublesome word."
> Evidence, p. 887-8, l. 13-25, 1-9

And later, St. Hill was asked:

> Q. Would be better if that section 14, instead of using the word "consult" used the term that is found in the policy, "listen to and seriously consider?"
> A. Well, that phrase "listen to and seriously consider" is reflective of what should be occurring and what does occur.
> Evidence, p. 894, l. 3-9

Suzanne Gervais the Acting Director of Victims Services with Manitoba Justice echoed similar views:

> "…the thing that pops out for me most is around the issue of consult, and victims feeling like they – I don't want to use the word direct the prosecution, because I don't think that that is the case, but it can be misleading, that word, for victim's families."
> Evidence, p. 997, l. 16-22

McCorrister was asked if the word "consult" should be changed to "listen and consider" and she agreed that "that would be much better."

Dyck said:

> "I think we have always had concerns with respect to the provision around consultation and what that means, and what that looks like, and how we operationalize that. And I think we have more work to do in that area."
> Evidence, p. 1194, l. 1-5

Manitoba Department of Justice Prosecutions Police Directive Guideline No 2.:VIC: 1 under the heading "Consultation with Victims" on page 2, provides that "Crown Attorneys are required to listen to and to seriously consider any information the victim, has to offer."

In view of the evidence that the term "consult" is problematic, raising misleading expectations in the mind of victims who feel that it gives them the right to direct prosecutions, and in view of the Crown directive, I concur with the recommendation which is reflective of the actual practice.

Commission counsel also recommended that I make the following recommendation to the Minister of Justice:

> That he examine methods for ensuring that victims are offered and, on request, are provided with personal assistance in preparing victim impact statements.

Robert Taman testified as to the emotional difficulties faced by victims who need some assistance in preparing their victim impact statements. Tara Taman testified that:

> "I really think there needs to be some more guidance on how to write it. You sit there for hours upon hours, and you have no clue what to put in there. And then you look at their guidelines as to what you can't put in there, and it makes it even tougher."
> Evidence, p. 343, l. 1-6

Jordan Taman made similar comments about the need for help in expressing yourself – how you are feeling. McCorrister said that arrangements could be made for victims to speak with victims rights workers. Dyck also testified that it was an emotional and difficult process for people to provide a victim impact statement.

I agree with the recommendation of Commission counsel.

Commission counsel further recommended that I make the following recommendation to the Minister of Justice:

> That he examine whether there are means to furnish independent prosecutors with complete access to the PRISM system, and if so, to make the PRISM system available to independent prosecutors.

Minuk was asked by Mr. Paciocco whether he had any recommendations that he might make with respect to access to information and participation in the PRISM system. He replied:

> "Two things I would say. One, PRISM should be available because – just as an example now, Mr. Paciocco, where matters are on remand to the new courts we have, which are not presided over by judges, and presided over by magistrates and assistants, not all Crown Attorneys and defence lawyers go to these courts, but messages get sent to what would be the Crown paralegals and it gets into the PRISM. I can put them in myself instead of having to write an e-mail to somebody to then put it in, and then wait for an e-mail back to find out whether or not the instruction was carried out. So, yes, access to PRISM would be good.
> And on the systemic issue, I would say that I don't understand why the Provincial Court does not have access electronically to me and to the public the way the Court of Queen's Bench does, where you can go in and look at a file and see the documents that had been filed, and the status of the case and matters of that sort. I would think that it should happen in the Provincial Court as well."
> Evidence, p. 5679-80, l. 17-25, 1-14

I agree with the recommendation of Commission counsel.

Commission counsel further recommended that I make the following recommendation to the Minister of Justice:

> That he take steps to ensure that independent prosecutors are provided with training in the requirements and the ethic of *The Victims' Bill of Rights*, and that they be required to attend any training sessions that may be offered to line Crowns dealing with the provisions of victims' services.

For the reasons that I have already given about the failure of independent counsel to comply with the provisions of *The Victims' Bill of Rights*, I agree with the recommendation of Commission counsel.

7. SYSTEMIC ISSUES RELATING TO NOTE-MAKING BY THE POLICE

One of the core difficulties that contributed to the unsuccessful prosecution of Zenk on the charges of impaired driving causing death, and refusing to provide a breath sample, was the manner in which notes were made by Pedersen, Bakema, Graham, Woychuk and Carter. The preparation of notes was approached by all five officers as if it was a burdensome task, although all professed to understand the importance of note-making. Indeed, as counsel for the ESPPD suggested to Carter:

> Q. Listening, as I have, to the evidence unfold, it seems to me that there's expectations on the part of some in this room, at least, that police officers spend their lives making notes?
> A. That is correct, sir, yes.
> Q. Would the requirement that you constantly, continuously make detailed notes, in addition to narratives, encumber your ability to discharge your duty?
> A. It would be – it would be very difficult, sir, to discharge my duty.
> Q. And it's up to each individual officer to decide how he or she spends their time, whether they do it making notes or making incident reports, or both?
> A. That's correct, sir.
> Evidence, p. 3129, l. 5-21

This exchange represents an unfortunate and significant failure to understand the importance of note-taking. It is not a burdensome task that police officers must reluctantly undertake because they were taught to do so at their police college. It is an integral part of a successful investigation and prosecution of an accused. It is as important as obtaining an incriminating statement, discovering incriminating exhibits or locating helpful witnesses. The preparation of accurate, detailed and comprehensive notes as soon as possible after an event has been investigated is the duty and responsibility of a competent investigator. The evidence is uncontradicted that Pedersen, Bakema, Graham, Woychuk and Carter were grossly negligent and incompetent in the preparation of their notes of the accident investigation.

It is an unfortunate fact that the administration of criminal justice in Canada does move with relative expedition, although section 11(b) of the *Canadian Charter of Rights and Freedoms* purports to guarantee any person charged with an offence "the right to be tried within a reasonable time."

Wolson, who represented Zenk, indicated that it was not uncommon to take up to a year or more for a trial to take place in the Provincial Courts of Manitoba. The delay in the Provincial Courts of Manitoba is not unique. The same situation occurs in almost every province of Canada. Delays are much longer in the superior courts because of the requirement that there be a preliminary inquiry where an accused requests it.

This means that police officers, who are usually the main witnesses in the criminal courts, are expected to recall events of an investigation long after their memory of the investigation has faded or, in some cases, even disappeared. In the meantime, a police officer will usually have been involved in new investigations that will only add to the concern of the court about the reliability of the officer's evidence. Woychuk candidly admitted that he had difficulty remembering many events and conversations without referring to his notes.

Judges recognize that memory becomes notoriously unreliable as time passes and other investigations and events take place. Judges also recognize that a police officer must refer to his or her notes when testifying if the officer's testimony is going to be reliable. Officers need to refer to notes while testifying to assist in recalling events that occurred long in the past. Accurate, detailed and comprehensive notes are essential if officers expect to be believed by the court.

An illustrative example of the notoriety of memory and the need to make accurate, detailed and comprehensive notes arose during the examination of Woychuk by Mr. Paciocco. It was critical to the investigation when Woychuk had smelled alcohol coming from Zenk. However, Woychuk had little memory of the events surrounding the investigation of Zenk without referring to his notes. Yet his notes were sparse and selective. Mr. Paciocco was asking him when he smelled alcohol on Zenk. His answers about when he smelled alcohol on Zenk had varied from interview to interview.

> Q. And then, of course, you are indicating there that you don't know exactly when it is. So you had access to your incident reports and notes before you spoke to the RCMP?
> A. Yes, I -- yes, I did.
> Q. And why is it that you didn't have confidence in those documents when you were speaking to the RCMP?
> A. I don't know. I guess it was just my – I didn't recall, my memory.
> Q. Sir, that's why we take notes, isn't it?
> A. Yes.
> Q. And if you don't trust your notes, then doesn't that tell you something more about your note-taking than it does about your memory?
> A. Yes.
> Evidence, p. 2274-5, l. 14-25, l. 1-5

Another glaring example occurred when Woychuk was having difficulty explaining what he told Carter when he brought Zenk to the station:

> Q. And, sir, how confident are you that you communicated those three pieces of information; that you had a driver, that you had an odour of liquor, and that he, indeed, was a police officer?
> A. I don't know. I don't have a -- an independent recollection of that conversation.
> Q. Nor do you have a note about that conversation, do you, sir?
> A. No.
> Evidence, p. 2300, l. 6-15

At one time, an officer was only required to produce the notes to the cross examiner if he or she relied upon the notes while testifying in court. However, if the witness used the notes to refresh his memory before entering the witness box, the witness did not have to produce them to the cross-examiner: *Kerenko* (1965), 45 C.R.291 (Man.C.A.).

The logic of this distinction was difficult to understand. All it did was to encourage witnesses to memorize their notes before they came to court. Today, any witness who refreshes his or her memory from notes or any statement prepared prior to trial must produce them to the cross examiner: *Catling* (1986), 29 C.C.C.(3d) 168 (Alta.C.A.); *Morgan* (1993), 80 C.C.C.(3d) 16 (Ont.C.A.).

A cross examiner is entitled to examine the notes to consider whether they are consistent with the witness's oral testimony; to attack the accuracy of the notes by questioning the timeliness of the record; or to raise the possibility of invention. Moreover, a police officer is required to produce his or her notes to the defence as part of the defence's right of disclosure: *Stinchcombe* (1995), 96 C.C.C.(3d) 318 (S.C.C.).

The notes should be accurate. The notes of Carter are a good example of notes that were inaccurate and resulted in the failure of the prosecution of Zenk on the charges of impaired driving and refusal to provide a sample. Although Carter knew that he had made a breath demand and was backed up by Woychuk, insertion of the word "blood" for "breath" demand in his notes made the accuracy of Carter's evidence that he made a breath demand suspect. That Carter inserted the word "blood" for "breath" several times in his incident narrative clearly indicated that he did not read what he had put into computer even though it was, according to Pedersen, the responsibility of the reader to correct errors. Inaccuracy in the notes also gives counsel for the defence the opportunity to question the reliability of other notes prepared by the officer as well as the testimony of the officer in the witness stand.

The notes should be detailed and comprehensive. Here, the notes of all of the officers failed to include information that was relevant and would have assisted in the investigation and prosecution of Zenk. Pedersen failed to note that she smelled alcohol while fingerprinting and photographing Zenk. Carter failed to indicate in his notes the basis upon which he formed the belief based on reasonable and probable cause that Zenk had been involved in the accident.

Notes that are not detailed and comprehensive leave the officer's testimony open to attack by the cross examiner. For example, Graham had testified that Bakema had told him that he could not smell alcohol on Zenk. Graham had not recorded that conversation in his note book. He was questioned by Mr. Paciocco:

> Q. Sir, did you not feel that was an important enough piece of information to communicate during these interviews?
> A. It could have been, yes.
> Q. And yet you didn't?
> A. No, I didn't.
> Q. And you are coming here, for the first time today, and providing this information, sir?
> A. Correct

> Q. And nowhere in your notes do you indicate that Chief Bakema could not smell alcohol?
> Evidence, p.1995-6, l. 16-25, l. 1-2

It is also too often forgotten that detailed and comprehensive notes serve another purpose. The notes themselves may be admitted in evidence in certain circumstances where an officer has absolutely no memory of an event. This is recognized in law and called "past recollection recorded." To be admissible, the past recollection must have been recorded in some reliable way. It must have been sufficiently fresh and vivid to be probably accurate at the time; the witness must be able now to assert that the record accurately represented his or her knowledge and recollection at the time (the witness must be able to affirm that "he knew it to be true at the time."); and the original record itself must be used, if procurable: *Wigmore on Evidence* (Chadbourn rev. 1970), vol. 3, c.28, para 744 et seq. See also *Meddoui (1990), 61 C.C.C.(3d) 345 (Alta.C.A.); B.(A.J.) (1994), 90 C.C.C.(3d) 210 (Nfld.C.A.) and F.(C.) (1997), 11 C.R.(5th) 209, 120 C.C.C.(3d) 225 (S.C.C.).*

The notes should be made as close as possible in time to the event witnessed. At one time, witnesses were only permitted to refer their memory from notes if they could swear that they made the notes at the time or shortly after the event being recorded. *Gwozdowski* (1973), 10 C.C.C.(2d) 434 (Ont.C.A.). However, the strictness of this rule has been relaxed for many years. The courts no longer require that the note be made by the witness shortly after the event. What now appears to be required is that the note be made either by the witness *when the event was fresh in the witness's mind: Coffin (1956), 114 C.C.C. 1 (S.C.C.); Shergill (1998), 13 C.R.(5th) 160 (Ont.G.D); B.(K.G.) (1998), 125 C.C.C.(3d)61 (Ont.C.A.).* Common sense tells us that unless the note was made at least when the event was fresh in the witness's mind, there is a serious risk that the note will contain errors that the witness will probably rely upon when giving testimony.

Sgt. James Anderson of the Winnipeg Police Service understood that an officer is only entitled to refer to a note that was made shortly after the incident recorded. He seemed to believe that unless the note was made on the same day or the day following day of the event recorded, the officer was not allowed to look at his or her notes. This would mean that an officer who, for some good reason, had not made the notes shortly after an incident would suddenly become of little use to an investigation where he or she was called to testify months or years later.

This does not mean that officers are entitled to delay preparation of their notes. They should do so as soon as possible after an incident. There was a suggestion by some witnesses that if an officer has been unable to complete his or her notes before the shift has ended, the practice is to delay completing the notes until their next shift. Pedersen said that she did not make her notes until the following day because she did not have the time to write it at the end of her shift, adding that it was still very fresh.

Woychuk said that he prepared his notes the following day during his shift. Carter said that he did not make his notes until the following Monday, when he was scheduled to work next. This practice should be condemned by superior officers. A police officer who is questioning a witness or photographing a crime scene does not stop in the middle of taking a statement or photographing the scene because his or her shift has ended. The preparation of notes, where possible, should be completed before the officer leaves his or her shift.

There was testimony that Bakema, Graham and Woychuk collaborated in the preparation of their notes. For many years, police forces in Canada, relying upon a British decision (*Bass (1953), 37 Cr.App.R. 51*. See also *Archibald (1956), 116 C.C.C. 62 (Que.S.C.)*), encouraged police officers to collaborate when making notes of the event provided that the notes were made while the events were fresh in their minds and provided that the notes contained only what each has observed. That practice is no longer considered by British authorities to be proper. (See *[1985] Crim. L.R. 781* and the Metropolitan Police Officers Instruction Books, Chapter 6, paragraph 9.)

The practice is now considered improper: *Barrett* (1993), 82 C.C.C.(3d) 266 (Ont.C.A.). The proper practice is for each officer to make his or her own independent set of notes. When officers collaborate in preparing notes, there is a serious risk that one officer may unconsciously supplement something from the other officer's recollection which he or she never observed. If it is then written down in the officer's notebook to be used to refresh his or her memory, it will become part of the officer's recollection even though he or she never saw it. Once combined memories are committed to a uniform set of notes, each officer will later refresh his or her memory as to an event that they never saw.

Finally, there was evidence that Bakema jotted down rough notes at the accident scene which were later transferred to his duty notes. There is nothing wrong with an officer doing this if he or she is unable enter the notes directly in the duty book because the notebook is not available during the investigation. In such instances, notes should be made on any piece of paper that is available and transferred to the duty book. The rough note must then be kept and attached to the duty book so that court can be satisfied as to the accuracy and reliability of the notes. The defence is entitled to production of all investigatory notes made by the police subject to claims of privilege: *Stinchcombe* (1995), 96 C.C.C.(3d) 318 (S.C.C.).

Poole did this on February 25 when he was called by Superintendent Scott while having coffee in a restaurant. He wrote his note of the conversation on a napkin and put it in his duty book. Graham did not do that in this case. He testified:

> Q. Do you keep a little jotter, note pad, or anything where you record times, or do you put them right into your notes?
> A. Sometimes just on a scrap paper, yeah.
> Q. And do you know what you did on this occasion?
> A. Probably scrap paper in the vehicle, a notepad, or something.
> Q. What do you do with the scrap paper after you take your notes, sir?
> A. I throw it out.
> Q. So you don't keep a record, your initial, original record of your times in case that falls into issue later?
> A. No.
> Evidence, p. 2020, l. 1-14

8. SUMMARY OF RECOMMENDATIONS

1. That there be such further investigation of the conduct of Harry Bakema and Kenneth Graham as the Attorney General of Manitoba may consider advisable;

2. That there be an investigation into the investigative training available to, and the qualifications required of East St. Paul police officers.

3. That the Minister of Justice give consideration to creating a provincial special investigative unit independent of all police enforcement agencies in Manitoba for the purpose of investigating any alleged criminal activity of a member of a police service.

4. That regardless of what form that independent investigative agency takes, the Minister of Justice cause appropriate measures to be taken to prevent police investigators in the province from giving police witnesses special procedural concessions in criminal investigations before they are interviewed, including the right to consult with their police association, the right to have interviews scheduled during shift hours, or the right to be warned about the criminal, civil or administrative implications of the statements they give.

5. That Minister of Justice cause the amendment of Guideline No 5: COU: 1 "Appointment of Independent Counsel: February 2008" by replacing Terms and Condition of Appointment "d" with the following:

> Independent prosecutors are required to keep the Department of Justice advised of all significant decisions that they propose to take in connection with the cases they are assigned. This is done solely to keep Department of Justice officials apprised of the status of the case, and to enable the Attorney general or the Deputy Attorney General to give direction as contemplated by "c' of this policy. Independent prosecutors should not consult with Department of Justice officials before making decisions but may secure legal assistance from Department of Justice officials who have special expertise in the area being prosecuted on strategies for implementing the decisions that have been taken by independent counsel Should the legal advice rendered cause the independent counsel to change their strategy or position, this must be publicly disclosed on the Manitoba Justice website after the trial judge has rendered a verdict in the case or the charge has been stayed. Subject to this policy, independent counsel has full access to all parties within, and all documents and information held by the Department of Justice for the Province of Manitoba. The Director of Regional Prosecutions and Education or any one designated shall facilitate contact between the departmental prosecutor and employees and the independent counsel and assist in accessing any documentation held by the Department of Justice.

6. That the Minister of Justice,

> Establish a standing group of experienced criminal lawyer who are independent of Manitoba Justice and who are able and prepared to provide advice and counsel to

any independent prosecutor in making or implementing their decisions, and that when that system is established, to make relevant amendments to Guideline No. 5: Cou: 1 "Appointment of Independent Counsel"

7. That the Minister of Justice cause a Ministerial Policy to issue relating to the presentation of a guilty plea requiring that:

(a) at the appearance where the plea of guilty is made, prosecutors must present the presiding judge with the factual foundation for the criminal charge, and call for a clear admission of the facts to be made by the accused, and further requiring that
(b) in complex or serious cases [as defined by Manitoba Justice] that prosecutors shall attempt to secure in writing, the agreed statement of facts that will form the foundation for the plea.

8. That the Minister of Justice cause a Ministerial Policy to issue requiring all prosecutors who resolve charges through resolution discussion to state clearly for the record the basis upon which the resolution was reached, including by:

(c) stipulating any compromises or concessions that have been made by the prosecutor in securing the guilty plea; and
(d) explaining, with specificity, any exigencies that motivated the prosecutor to refrain from proving aggravating facts, or to agree to the sentence being proposed, or to stay any related charges.

9. That the Minister of Justice cause a Ministerial Policy to issue requiring all prosecutors to recognize that it is improper for the Crown to withhold from the court any relevant information in order to facilitate a guilty plea and, where not all matters are admitted, to advise the court of the allegations and then proceed upon the admitted facts.

10. That the Minister take steps to promote an amendment to *The Victims' Bill of Rights* that would enable parents and children of a deceased victim to enjoy the informational rights provided for in *The Victims' Bill of Rights* in cases where the parents or children request access to those rights on the basis that the spouse of the victim may be unable or unwilling to disseminate information to them.

11. That the Minister of Justice take steps to promote an amendment to section 14 of *The Victims' Bill of Rights* that would replace the overreaching promise to "consult" victims on the matters enumerated in that provision, with the right of victims to have their views "listened to and seriously considered."

12. That the Minister of Justice examine methods for ensuring that victims are offered and, on request, are provided with personal assistance in preparing victim impact statements.

13. That the Minister of Justice examine whether there are means to furnish independent prosecutors with complete access to the PRISM system, and if so, to make the PRISM system available to independent prosecutors.

14. That the Minister of Justice take steps to ensure that independent prosecutors are provided with training in the requirements and the ethic of the Victims Bill of Rights, and that they be required to attend any training sessions that may be offered to line Crowns dealing with the provisions of Victims' services.

MANITOBA

ORDER IN COUNCIL

DATE: **December 5, 2007**

ORDER IN COUNCIL NO.: **403/2007**

RECOMMENDED BY: **Minister of Justice**

ORDER

1. The Honourable Roger Salhany, Q.C. is appointed as commissioner to do the following:

   (a) To inquire into the conduct of the police investigations surrounding the death of Crystal Taman on February 25, 2005, including, but not limited to,

      (i) the correctness and adequacy of the procedures and practices that were followed, and

      (ii) the good faith, objectiveness and professional standards with which the procedures and practices were applied and decisions made.

   (b) To inquire into whether all aspects of the prosecution of Derek Harvey-Zenk, including the Crown's position on sentence, were conducted in accordance with the professional and ethical standards expected of lawyers and agents of the Attorney General.

   (c) To inquire into whether the services provided to the family of Crystal Taman were sufficient having regard to the requirements of *The Victims' Bill of Rights*.

   (d) To give advice on whether findings on any of the above matters gives rise to a need for further study, review or investigation and, if so, by whom.

2. The commissioner must report his findings on these matters — including any findings respecting practices or systemic issues that may have contributed to or influenced the course of the investigations or resulting prosecution in this matter — and make such recommendations as he considers appropriate to help restore public confidence in the justice system in Manitoba.

3. In keeping with the principles summarized by the Supreme Court of Canada in *Canada (Attorney General) v. Canada (Commissioner of the Inquiry on the Blood System)*, the commissioner must perform his duties without expressing any conclusion or recommendation about the civil or criminal liability of any person or organization.

4. The commissioner must complete his inquiry and deliver a final report containing his findings, conclusions and recommendations to the Attorney General by September 30, 2008. He may also give the Attorney General any interim reports that he considers appropriate to address urgent matters. All reports must be in a form appropriate for public release, but release is subject to *The Freedom of Information and Protection of Privacy Act* and other relevant laws.

5. Nothing in paragraph 1 limits the commissioner's right to request the Lieutenant Governor in Council to expand the terms of reference to cover any matter that he considers necessary as a result of information that comes to his attention during the course of the inquiry.

6. To the extent the commissioner considers it advisable, he may rely on a transcript or record of proceedings before any court relating to the prosecution against Derek Harvey-Zenk or relating to any other matter the commissioner considers relevant.

7. Government departments and agencies and other bodies established under the authority of the Manitoba Legislature, and the various police services involved in the investigations referred to in paragraph 1(a), must assist the commissioner to the fullest extent permitted by law. The commissioner may review all records maintained by Manitoba Justice and the various police services, and any reports or analyses about the matters referred to in paragraph 1 whether prepared by Manitoba Justice or others.

8. Before public hearings take place, the commissioner may interview any person connected with the matters referred to in paragraph 1, including employees of Manitoba Justice and of any police services involved. On the commissioner's behalf, interviews may be conducted by counsel for the commissioner, either alone or in the commissioner's presence. If conducted alone, counsel must give the commissioner a transcript or a report of each interview.

9. The Minister of Finance may pay the following amounts from the Consolidated Fund, at the request of the Attorney General:

   (a) travelling and other incidental expenses that the commissioner incurs conducting his inquiry;

   (b) fees and salaries of any advisors and assistants employed or retained for the purpose of the inquiry;

   (c) any other operational expenditures required to support the inquiry.

10. This Order is effective immediately.

AUTHORITY

Subsection 83(1) and section 96 of *The Manitoba Evidence Act*, C.C.S.M. c. E150, state in part:

Appointment of commission
83(1) Where the Lieutenant Governor in Council deems it expedient to cause inquiry to be made into and concerning any matter within the jurisdiction of the Legislature and connected with or affecting

...

(c) the administration of justice within the province;

...

(f) any matter which, in his opinion, is of sufficient public importance to justify an inquiry;

he may, if the inquiry is not otherwise regulated, appoint one or more commissioners to make the inquiry and to report thereon.

Power to make rules
96 The Lieutenant Governor in Council may make provision, either generally in regard to all commissions issued and inquiries held under this Part, or specially in regard to any such commission and inquiry, for

(a) the remuneration of commissioners and persons employed or engaged to assist in the inquiry, including witnesses;

(b) the payment of incidental and necessary expenses; and

(c) all such acts, matters, and things, as are necessary to enable complete effect to be given to every provision of this Part.

BACKGROUND

1. Crystal Taman was killed in an automobile collision on February 25, 2005, and Derek Harvey-Zenk was subsequently charged with criminal negligence causing death, impaired driving causing death, dangerous driving causing death and refusing a breathalyzer test.

2. The charges of impaired driving causing death, criminal negligence causing death and refusing a breathalyzer test were subsequently stayed by independent counsel acting for the Attorney General. Following a joint sentencing recommendation, Derek Harvey-Zenk received a conditional sentence of two years less a day for a single charge of dangerous driving causing death.

TAMAN INQUIRY

Witness List

The following are the witnesses that testified at the Inquiry.

First week: June 2, 2008

1. Robert Taman
2. Tara Taman
3. Kristin Taman
4. Jordan Taman

Second week: June 9, 2008

5. Sveinn Sveinson
6. Victoria Sveinson
7. Glenda Pedersen
8. Jacqueline St. Hill
9. Suzanne Gervais
10. Lesley McCorrister
11. Monica Dyck

Third week: July 2, 2008

12. Kathy Beattie
13. Garth Shaw
14. Tara Taman
15. Denise Bukowski
16. Cecil Sveinson
17. Edward Rosser
18. Rolland Fontaine
19. Glenda Pedersen
20. Ken Graham

Fourth week: July 7, 2008

21. Ken Graham
22. Cst. Jason Woychuk
23. Bryan Maloney
24. Chief Norm Carter

Fifth week: July 14, 2008

25. Chief Norm Carter
26. Harry Bakema
27. Chelsea O'Halloran
28. Darcey Gerardy
29. Rodrigo Bravo
30. Chief of Police, Keith McCaskill
31. Sgt. Sean Black

Sixth week: July 21, 2008

32. Sgt. Sean Black
33. Cst. Ken Azaransky
34. Cst. David Harding
35. Sgt. James Anderson
36. Cst. Chris Humniski
37. Cst. McLure
38. Cst. Ted Michalik
39. Cst. Jay Nolet
40. Cst. Theodore Spruyt
41. Inspector James Poole
42. Det. Sgt. Girard

Seventh week: July 28, 2008

43. Det. Sgt. Girard
44. Richard Wolson
45. Martin Minuk
46. Richard Peck

Eighth week: August 5, 2008

47. Brian Kaplan
48. Brian Gover
49. Don Slough
50. Derek Harvey-Zenk

TAMAN INQUIRY

Exhibit List

Exhibits may be viewed on the Inquiry website at: **www.tamaninquiry.ca**

EX ID.	EX. NO.	DISCLOSURE REFERENCE	EXHIBIT DESCRIPTION	FILED BY
			February 4th, 2008	
	1		Hearings on Standing and Preliminary Matters Book	D. Paciocco
			June 2nd , 2008	
	2	**Z-2**	Photograph of Crystal Taman	D. Paciocco
	3	**A-1**	Order in Council	D. Paciocco
	4a	**G-39.a**	Information in Prosecutorial File (Information charging Derek Harvey-Zenk)	D. Paciocco
	4b	**G-39.b**	Endorsed Information and Court File (Information charging Derek Harvey-Zenk)	D. Paciocco
	5	**E-1.23.j**	Promise to Appear(HARVEY-ZENK, Derek)	D. Paciocco
	6	**J.60**	July 16, 2007 Proceedings Before The Honourable Judge Stewart	D. Paciocco
	7	**J.61**	July 17, 2007 Proceedings Before The Honourable Chief Judge Wyant	D. Paciocco
	8	**J.62**	Transcript of Sentencing Submission August 22, 2007	D. Paciocco
	9	**J.63**	Transcript of Hearing Directed by Chief Judge Wyant Relating to Appropriateness of Joint Submission - September 12, 2007	D. Paciocco
	10	**J.64**	Transcript of Sentencing Decision October 29, 2007	D. Paciocco
	11	**L-74**	PRISM Victims Communications with Robert Taman	D. Paciocco
	12	**R-3.92.6**	Complete package of Victims' Bill of Rights forms and brochures as described in the memos from Tab R-3.92.5	D. Paciocco
	13	**R-2.91.62**	File copy of letter to Robert Taman dated September 5, 2007	D. Paciocco
	14	**K.66**	Manitoba Justice Request for RCMP to Investigate - May 5, 2006	D. Paciocco
	15	**K.67**	RCMP Response to Request to Investigate - May 23, 2006	D. Paciocco
	16	**K.68**	Executive Summary	D. Paciocco
	17	**K.69**	Investigative Report RCMP File 2006-633220	D. Paciocco
	18	**S.100**	Wolson's Memo to File - July 18, 2007 Outlining Discussions with Mr. Minuk Concerning Plea Bargain	D. Paciocco
			June 9th, 2008	
	19	**O.81.a:12**	Letter to Minister of Justice Gord MacIntosh dated August 31, 2005	D. Paciocco

EX ID.	EX. NO.	DISCLOSURE REFERENCE	EXHIBIT DESCRIPTION	FILED BY
	20	**O.81.a.10**	Letter to Federal Minister of Justice Vic Toews dated April 03, 2006	D. Paciocco
	21	**R-2.91.61**	File copy of letter to Victoria and Sveinn Sveinson dated September 5, 2007	D. Paciocco
	22	**R-1.91.33**	Memo from Andrea dated September 13, 2006	D. Paciocco
	23	**O.81.a.8**	Letter to Crown Attorney Martin Minuk September 2006	D. Paciocco
	24	**R-1.91.34**	Letter from Victoria Sveinson and Sveinn Sveinson dated December 14, 2006	D. Paciocco
	25	**O.81.a.7**	Letter to Attorney General Dave Chomiak dated August 25, 2007	D. Paciocco
	26	**O.81.a.6**	Letter to Attorney General Dave Chomiak dated September 14, 2007	D. Paciocco
	27	**O.81.a.5**	Letter to Attorney General Dave Chomiak dated October 1, 2007	D. Paciocco
	28	**O.81.b.2**	Letter from Assistant Deputy Attorney General Don Slough Dated October 5, 2007	D. Paciocco
	29	**O.81.a.4**	Letter to Attorney General Dave Chomiak dated October 15, 2007	D. Paciocco
	30	**O.81.a.14**	Letter to The Law Society of Manitoba Conflict of Interest Complaint Dated September 24, 2007	D. Paciocco
	31	**O.81.b.5**	Letter from the Law Society of Manitoba September 25, 2007 & (addition submitted April 15, 2008) Letter from Law Society of Manitoba dated November 5, 2007	D. Paciocco
	32	**O.81.b.4**	Letter from the Law Society of Manitoba October 5, 2007	D. Paciocco
	33	**O.81.a.11**	Letter to Minister of Justice Gord MacIntosh October 2005	D. Paciocco
	34	**O.81.a.9**	Letter to Federal Minister of Justice Vic Toews August 29, 2006	D. Paciocco
	35	**R-2.91.57**	Hard copy of email from Martin Minuk to Brian Kaplan sent August 28, 07 at 10:17 am with attached file copy of letter to Mr. and Mrs. Sveinson dated August 15, 2007	D. Paciocco
	36	**O.81.a.3**	Victim's Impact statement of Victoria and Sveinn Sveinson	D. Paciocco
	37	**R-2.91.52**	Memorandum from Monica Dyck to Martin Minuk dated August 8, 2007	D. Paciocco
	38	**R-2.91.69**	File copy of letter to Victoria Sveinson and Sveinn Sveinson Dated September 11, 2007	D. Paciocco
	39	**O.81.a.2a**	Letter sent to Judge Ray Wyant with letter #2 after the trial	D. Paciocco
	40	**O.81.a.2**	Letter sent to Judge Wyant after the trial	D. Paciocco
	41	**L.75**	PRISM Victims Communications with Victoria Sveinson	D. Paciocco
	42	**E-2.26.a**	Officer's Notes - Cst. Pedersen (pp 90 - 97)	W. Clifford
	43	**E-2.26.b**	Narrative Police Report - Cst. Pedersen	W. Clifford
	44	**E-2.26.c**	Statement to R.C.M.P. - May 31, 2006 (Cst. Pedersen)	W. Clifford
	45	**P-3.86**	Correspondence from Fillmore & Riley to commission Counsel Dated March 18, 2008	W. Clifford
			June 10th, 2008	

EX ID.	EX. NO.	DISCLOSURE REFERENCE	EXHIBIT DESCRIPTION	FILED BY
	46	R-1.91.22	Hard copy of email trail, last message from Brian Kaplan to Jacqueline St. Hill sent May 19, 2006 at 7:50am	D. Paciocco
	47	R-3.92.1	Hard copy of email dated February 7, 2002 from Tammy Padoba to Jacqueline St. Hill attaching memo dated February 6, 2002	D. Paciocco
	48	R-4	Disclosure Relating to the Prosecution (Further Disclosure from the Government of Manitoba)	D. Paciocco
	49	R-3.92.7	Hard Copy of email dated March 17, 2008 from Jacqueline St. Hill to Glenn McFetridge attaching copies of Victim Services Policy	D. Paciocco
	50	R-3.92.5	Memos dated February 19, 2008 from Monica Dyck to Glenn McFetridge	D. Paciocco
	51	U.B	Book of Statutes (B - The Victims' Bill of Rights)	D. Paciocco
	52	R-3.92.4	Hard copy of email dated July 8, 2004 from Rachelle Dupuis to Jacqueline St. Hill attaching memo to All Prosecution Staff	D. Paciocco
	53	R -5	Prosecutions Policy Manual	D. Paciocco
	54	G.43.a	Retainer for Mr. Minuk dated March 3, 2005	D. Paciocco
	55	G.43.b	Letter from Minuk to Kaplan dated October 3, 2007	D. Paciocco
			June 11th, 2008	
	56	M-77	Additional Media Search Conducted by the Commission (pages 1-36), Additional Media Search Conducted by the Commission (pages 37-73), Additional Media Search Conducted by the Commission (pages 74-107)	G. Zazelenchuk
	57	Z-3	Photograph of Crystal Taman as provided by the parents	D. Paciocco
	58	M-76.g	Media Article - Winnipeg Sun - Feb 26, 2005 - Woman killed fatal rear end	D. Paciocco
	59	I-50	Photos of Victim with Family	D. Paciocco
			July 2, 2008	
	60	B.6.a	Forensic Accident Report dated August 18, 2005	D. Paciocco
	61	B.7	Environment Canada Report for February 24 & 25, 2005	D. Paciocco
	62	B.8.a	Accident Photos	D. Paciocco
	63	D.18.a	E. St. Paul Fire Department Rescue Report for February 25, 2005	D. Paciocco
	64	D.19.e	Letter to Corp. T. DOYLE from N. TYNSKI dated June 12, 2006 Re: Interlake EMS Manager Times	D. Paciocco
	65	D.20.e	WPS Fire Paramedic Services Dispatch Sheet for February 25, 2005	D. Paciocco
	66	B.8.b	Overhead Photo (blow up)	D. Paciocco
	67	B.8.c	Traffic Signal Surface Plan (blow up)	D. Paciocco
	68		Background Narrative of Fact Surrounding the Accident	D. Paciocco
	69	Z - 1	Statement of Facts Pertinent to the Rural Municipality of East St. Paul Agreed to by Commission Counsel	D. Paciocco

EX ID.	EX. NO.	DISCLOSURE REFERENCE	EXHIBIT DESCRIPTION	FILED BY
	70	E-1.23.n	Statement by Kathy Beattie Traffic Report	V. Clifford
	71	C.11	Statement by Kathy Beattie to R.C.M.P.	V. Clifford
	72	C.12.a	Statement by Garth Shaw to E. St. Paul Police	D. Paciocco
	73	C.12.b	Statement by Garth Shaw to R.C.M.P.	D. Paciocco
	74	F-3.37	Gallery Photo Pack Shown to Branigan's Waitress	G. Zazelenchuk
			July 3, 2008	
	75	C.13.a	Denise Bukowski – Statement to E. St. Paul Police – March 7, 2005	D. Paciocco
	76	C.13.b	Denise Bukowski – Statement to R.C.M.P. – May 30, 2006	D. Paciocco
	77		Ted Rosser's Ambulance Patient Care Report on Derek Harvey-Zenk	D. Paciocco
	78	D.19.c	Edward Rosser – Statement to E. St. Paul Police – March 24, 2005	D. Paciocco
	79	D.19.d	Edward Rosser – Statement to R.C.M.P – May 25, 2006	D. Paciocco
	80	D.19.a	Roland Fontaine – Statement to E. St. Paul Police – March 29, 2005	V. Clifford
	81	D.19.b	Roland Fontaine – Statement to R.C.M.P. – May 29, 2006	V. Clifford
			July 4, 2008	
	82	B.8.a	4 additional pictures of Accident Scene (23,26,27,28)	G. McFetridge
	83	E.1.24.a	Cst. Graham - Duty Book Notes (pp. 34 – 45 + 131 – 135)	D. Paciocco
	84	AMENDMENT TO E.1.24.d	Initial Disclosure – E. St. Paul Police Witnesses (Amendment)	D. Paciocco
			July 7th, 2008	
	85	E-1.24.b	Incident Narrative - March 3, 2005 (Cst. GRAHAM)	D. Paciocco
	86	E-1.24.c	Incident Narrative - April 1, 2005 (Cst. GRAHAM)	D. Paciocco
	87	E-1.22.a	Officer's Notes (BAKEMA, Arend) - pages 76 - 89	D. Paciocco
	88	E-2.25 a	Duty Book Notes - Cst. WOYCHUK – pages 38 - 43	D. Paciocco
	89	E-2.25 b	Incident Narrative - Cst. WOYCHUK	D. Paciocco
	90	E-2.25 d	First Statement to R.C.M.P. - dated May 24, 2006 (Cst. Woychuk)	D. Paciocco
	91	E-2.25 f	Second Statement to R.C.M.P. of June 9, 2006 (Cst. Woychuk)	D. Paciocco
	92	P-3.88	Harry Bakema – Statement prepared for counsel	D. Paciocco
	93	P-2.85.1	(Pages 2574-2613) Excerpts from East ST. Paul Police Policies and Procedures Manual (Pages 2614-2657) Excerpts from East ST. Paul Police Policies and Procedures Manual cont'd	D. Paciocco

EX ID.	EX. NO.	DISCLOSURE REFERENCE	EXHIBIT DESCRIPTION	FILED BY
	94	**P-1.83**	(Pages 2185-2225) Correspondence from Fillmore Riley March 6 2008 and Incident report and development log (Pages 2226-2265) Incident Report and Development Log cont'd (Pages 2266-2304) Incident Report and Development Log cont'd (Pages 2305-2344) Incident Report and Development Log cont'd (pages 2385-2442) Incident Report and Development Log cont'd	D. Paciocco
	95		Changes to Text found in versions at 2212-2213	D. Paciocco
	96		Feb 26 version of Incident Report 2212-2213	D. Paciocco
	97		Feb 27 version of Incident Report alcohol additions	D. Paciocco
	98		Feb 26 version of Incident Report 2212-2213 – Reason for Transportation	D. Paciocco
	99		Feb 27 version of Incident Report – Reason for Transportation	D. Paciocco
	100	**P-2.85.8**	Handwritten note of N. Carter made on March 5, 2006	D. Paciocco
	101	**P-2.85.9**	Handwritten note of N. Carter dated April 10, 2006	D. Paciocco
	102	**P-3.85.12**	Handwritten note of N. Carter dated April 21, 2006	D. Paciocco
			July 8th, 2008	
	103	**P-3.85.13**	Handwritten note of N. Carter dated April 27, 2006	D. Paciocco
	104	**P-3.85.14**	Handwritten note of N. Carter dated May 18, 2006	D. Paciocco
	105	**B.10.c.i**	Manitoba Driver Licence (copy) - HARVEYMORDENZENK	G. Zazelenchuk
	106	**E-1.23.i**	E. St. Paul Police Prisoner Log Sheet (HARVEY-ZENK, Derek)	G. Zazelenchuk
			Application by Commission Counsel to Exclude Ken Graham	
	1		Bryan Maloney's handwritten statement of incident dated July 8,2008	D. Paciocco
	107	**T.4.b**	East St. Paul Witnesses - Cst. Jason Woychuk	H. Weinstein
	108	**E-1.23.e**	Notice of Forfeiture to Alleged Offender dated February 25, 2005	J. Prober
	109	**E-1.23.f**	Notice of Intention to Seek Greater Punishment dated February 25, 2005	J. Prober
	110	**E-1.23.g**	Suspension or Disqualification for 24 Hours (HARVEY-ZENK, Derek) Dated February 25, 2005	J. Prober
	111	**E-1.23.h**	Notice of Seizure and Impoundment of Motor Vehicles dated February 25, 2005	J. Prober
	112		Bryan Maloney's handwritten statement of incident dated July 8, 2008	V. Clifford
	113	**E-2.30**	Cst. Maloney - Statement to R.C.M.P. - dated June 1, 2006	V. Clifford
			July 9th, 2008	
	114	**E-1.23.k**	Incident Narrative - February 27, 2005 (CARTER, Norman)	V. Clifford
	115	**E-1.23.b**	Officer's Notes(CARTER, Norman) February 25 - May 29, 2005	V. Clifford

EX ID.	EX. NO.	DISCLOSURE REFERENCE	EXHIBIT DESCRIPTION	FILED BY
	116	**E-1.23.a**	Officer's Notes(CARTER, Norman) February 25, 2005	V. Clifford
	117	**E-1.23.r**	Statement to R.C.M.P. - May 23, 2006 (Chief Norm CARTER)	V. Clifford
	118	**E-1.23.c**	Breathalizer Demand and Refusal Warning Card	V. Clifford
	119	**P-2.85.9**	Correspondence from Fillmore & Riley dated May 28, 2008 Re: Forwarding further disclosure	V. Clifford
	120	**P-2.85.5**	Notice from East St. Paul Police to Brian Kaplan dated March 1, 2005	V. Clifford
	121	**E-1.23.l**	E. St. Paul Police Exhibit Report dated February 25, 2005	V. Clifford
	122	**P-2.85.6**	Letter from Aikins MacAulay to Sgt Carter dated march 17, 2005	V. Clifford
	123	**E-1.23.o**	Report to Marty Minuk and Covering Letter (including Sgt. Carter's Incident Narrative)	V. Clifford
	124	**R-1.91.7**	Photocopy of letter from Martin Minuk to Sgt. Norm Carter dated December 20, 2005	V. Clifford
	125	**R-1.91.13**	Photocopy of letter from Martin Minuk to Chief Norman Carter dated April 10, 2006 attaching Witness List	V. Clifford
	126	**R-1.91.14**	Photocopy of letter from Martin Minuk to Chief Norman Carter dated April 20, 2006	V. Clifford
			July 10th, 2008	
	127	**P-3.85.15**	Miscellaneous notes of N. Carter between May 15 and 31, 2006	V. Clifford
	128	**E-1.23.q**	Fax cover sheet to Marty Minuk re: Bakema's second set of notes	V. Clifford
	129	**E-1.23.p**	Fax Cover Sheet to Marty Minuk re: Cst Krawchuk's notes	V. Clifford
	130	**P-3.85.19**	Risk Management notice dated June 12, 2006 prepared by Norman D. Carter	V. Clifford
	131	**P-3.85.24**	Handwritten note of N. Carter dated July 15, 2007 re: call from M. Minuk	V. Clifford
	132	**P-3.85.25**	Handwritten note of N. Carter (undated) re: Jason Woychuk meeting with M. Minuk	V. Clifford
	133	**P-2.83**	(Page 2443-2482) Incident Report and Development Log cont'd (Pages 2483-2522) Incident Report and Development Log cont'd (Pages 2523-2568) Incident Report and Development Log cont'd	V. Clifford
	134	**P-2.83**	Pages 2564-2568 N. Carter – Incident Report – February 27, 2005	V. Clifford
	135	**P-2.83**	Pages 2552-2557 N. Carter – Incident Report – March 1, 2005	V. Clifford
	136	**E-1.23.s**	Correspondence January 24, 2008 Re: Identification of Criminal Act Photo of Derek HarveyZenk	V. Clifford
	137	**Q-1.89.b.4**	Acting Inspector J. Poole (notes) **(NOTE: Original exhibit stricken. Replaced July 24, 2008 with a clear copy of document Q-1.89.b.4)**	M. Jack
	138	**Q-2.89.b.17**	Winnipeg Police Service Supplementary Report, Girard reporting, PSU # 05-019	M. Jack
			July 14th, 2008	
	139	**N.78**	R.C.M.P. Management Review Document dated 2007 11 27 to 2007 11 30	B. McDonald

EX ID.	EX. NO.	DISCLOSURE REFERENCE	EXHIBIT DESCRIPTION	FILED BY
	140	G.41	E. St. Paul Prosecutors Information Sheet dated March 1, 2005	B. McDonald
	141	E-2.25.c	Winnipeg Police Service ID - HARVEY-ZENK	B. McDonald
	142	R-2.91.73	Hard copy of email from Don Slough to Martin Minuk sent September 20, 2007 at 9:21 am with draft memorandum from Martin Minuk - undated	B. McDonald
	143	R-2.91.74	Hard copy of email from Martin Minuk to Don Slough sent September 20, 2007 at 11:12 am with attached memo dated September 20, 2007	B. McDonald
	144		First 2 pages of N. Carter's file with a date stamp of August 30, 2005 Re: WPS Professional Standards Unit PSU - #05-019	D. Paciocco
	145	E-1.22.c	E. St. Paul Police Incident Report - created February 25, 2005	D. Paciocco
	146	E-1.22.b	Officer's Notes - H. BAKEMA - pages 64 - 74	D. Paciocco
			July 15th, 2008	
	147	P-3.87.2	Correspondence from Fillmore & Riley dated April 2, 2008 – Cell Phone Call Records of E. St. Paul Police Service	D. Paciocco
	148		Bakema notes – details found in final notes not found in original on scene notes	D. Paciocco
	149		Coincidental details found in Graham's on-scene notes and not found in Bakema's on-scene notes at pages 395 - 400	D. Paciocco
	150	Q-1.89.b.9	Deputy Chief D. Webster – Notes of Tuesday, March 1 Morning Briefing	D. Paciocco
	151	R-1.91.30	Letter from H. Weinstein to M. Minuk dated June 27, 2006	H. Weinstein
			July 16th, 2008	
	152	W (W.1 – W.8)	Documentary Evidence from Branigan's Restaurant Dated February 23 & 24, 2005	D. Paciocco
	153	W.9	18 Photos of Branigan's Bar (Garden City Location, 787 Leila Avenue) and CAD Floor plan of the Bar	D. Paciocco
	154	F-3.38.b	Interview of C. O'Halloran dated March 11, 2005 by P.S.U.	D. Paciocco
	155		Email from Shannon Hanlin sent July 2, 2008 at 6:58pm with blank WPS Photo Line Up Form and WPS Line Up for Operations/Div 13 – February 25, 2005	D. Paciocco
	156	T.5.a	Chelsea O'Halloran - Commission Interview March 12, 2008	M. Jack
	157	F-3.38.a	P.S.U. Interview of Darcey Gerardy & Rodrigo Bravo dated March 11, 2005	V. Clifford
			July 17th, 2008	
	158	Q-1.89.b.11	Handwritten Notes of Inspector K. McCaskill February 28, 2005 (2 pages)	D. Paciocco
	159		Handwritten Note of Inspector McCaskill dated February 28, 2005 at 17:50 hrs	D. Paciocco
	160	Q-2.89.b.35	WPS Interoffice Memo dated February 25, 2005 of Inspector Keith McCaskill Re: Harvey-Zenk/2180-13	G. Zazelenchuk
	161	Q-1.89.b.10	Superintendent C. Scott Notes dated February 25, 2005	G. Zazelenchuk
	162	Q-2.89.b.25	Statement of Sean Kevin Black – File: 05-9749 01	D. Paciocco

EX ID.	EX. NO.	DISCLOSURE REFERENCE	EXHIBIT DESCRIPTION	FILED BY
	163	F-1.33.b	Line-up for Operations / Div 13 – E Shift for February 24, 2005 (1 page)	D. Paciocco
	164	F-1.35.c	P.S.U. Transcript of Interview of Cst. Sean Black dated March 11, 2005	D. Paciocco
			July 21st, 2008	
	165		Hand-drawn diagram of Sean Black's kitchen	D. Paciocco
	48b	R-4	Additional Disclosure provided by Glenn McFetridge at the June 2 Hearings	G. Zazelenchuk
	166	F-1.35.a	P.S.U. Transcript of Interview of Cst. Ken Azaransky dated March 11, 2005	V. Clifford
			July 22nd, 2008	
	167	F-1.35.e	P.S.U. Transcript Interview of Cst Tracy Fudge dated March 25, 2005	D. Paciocco
	168		Transcript of Proceedings July 21, 2008 – Evidence of Tracey Fudge	D. Paciocco
	169	F-1.35.g	P.S.U. Transcript of Interview of Dave Harding dated March 2, 2005	V. Clifford
	170	F-2.35.r	P.S.U. Transcript of Interview of Jim Anderson dated February 28, 2005	D. Paciocco
	171	Q-1.89.b.3	Detective Sergeant R. Girard (notes)	D. Paciocco
	172	F-1.33.c	Winnipeg Police Service Overtime Time Exception Sheets	D. Paciocco
	173	F-1.35.i	P.S.U. Transcript of Interview of Cst Kelly McLure dated March 3, 2005	V. Clifford
			July 23rd, 2008	
	174	F-2.35.s	P.S.U. Transcript of Interview of Sgt Chris Humniski dated February 28, 2005	D. Paciocco
	175	Q-1.89.b.12	Superintendent A. Stannard (notes) dated February 28, 2005	D. Paciocco
	176	S-98.b	R. Wolson's Handwritten Notes - List of witnesses that were going to be called	G. Zazelenchuk
	177	F-2.35.j	P.S.U. Transcript of Interview of Cst Ted Michalik dated March 3, 2005	V. Clifford
	178	F-2.35.l	P.S.U. Transcript of Interview of Cst Jay Nolet dated March 3, 2005	V. Clifford
	179	F-2.35.n	P.S.U. Transcript of Interview of Cst Theodore Jack Spruyt dated March 3, 2005	V. Clifford
	180	Q-2.89.b.19	WPS Shift Schedule December 2004 – April 2005	S. Hanlin
			July 24th, 2008	
	137	Q-1.89.b.4	Acting Inspector J. Poole (notes) **(Clear copy of original document Q-1.89.b.4 filed July 10, 2008)**	D. Paciocco
	181	Q-2.89.b.26	Email from Jim Poole to Jennifer Smeets sent February 28, 2005	D. Paciocco
	182	Q-2.89.b.28	Email From Doug Webster to Jim Poole sent March 2, 2005	D. Paciocco
	183	Q-2.89.b.20	Suspension Hearing Brief of Cst. Derek Harvey-Zenk#2180 dated March 22, 2005	D. Paciocco
	184	F-1.33.a	Supplementary Report - Sgt. Roger Girard dated April 11, 2005	D. Paciocco

EX ID.	EX. NO.	DISCLOSURE REFERENCE	EXHIBIT DESCRIPTION	FILED BY
	185	**Q-2.89.b.31**	Email from Jim Poole to Doug Webster sent May 6, 2005	D. Paciocco
	186	**Q-2.89.b.36**	Winnipeg Police Service Inter Office Memorandum dated March 2, 2005	G. Zazelenchuk
	187	**F-1.34**	Supplementary Report (ROXBURGH, Douglas)	G. Zazelenchuk
	188	**F-2.35.p**	P.S.U. Transcript of Interview of Cst Werner Toews dated March 15, 2005	G. Zazelenchuk
	189		Witness preamble - Police/Staff	D. Paciocco
	190		Witness preamble - Non-police	D. Paciocco
	191		Email response from Doug Webster to Jim Poole sent May 6, 2005	D. Paciocco
	192	**F-1.35.h**	P.S.U. Transcript of Interview of Jacek Kapka dated March 2, 2005	D. Paciocco
	193	**F-2.35.u**	P.S.U. Transcript of Interview of Cst Daniel Mikawoz dated March 2, 2005	D. Paciocco
	194	**F-2.35.v**	P.S.U. Transcript of Interview of Cst Christian Guyot dated March 2, 2005	D. Paciocco
	195	**F-2.35.w**	P.S.U. Transcript of Interview of Cst Al Williams dated March 3, 2005	D. Paciocco
	196	**F-2.35.x**	P.S.U. Transcript of Interview of Cst Marnie Nechwediuk dated March 3, 2005	D. Paciocco
	197	**F-2.35.o**	P.S.U. Transcript of Interview of Cst Lloyd Swanson dated March 3, 2005	D. Paciocco
	198	**F-2.35.k**	P.S.U. Transcript of Interview of Cst Brian Neumann dated March 10, 2005	D. Paciocco
	199	**F-2.35.q**	P.S.U. Transcript of Interview of Cst Shaun Veldman dated March 11, 2005	D. Paciocco
	200	**F-1.35.d**	P.S.U. Transcript of Interview of Cst Jules Buors dated March 11, 2005	D. Paciocco
	201	**F-1.35.f**	P.S.U. Transcript of Interview of Cst Sammi Haddad dated March 15, 2005	D. Paciocco
	202	**F-2.35.m**	P.S.U. Transcript of Interview of Cst Gord Schneider dated March 15, 2005	D. Paciocco
	203	**F-1.35.b**	P.S.U. Transcript of Interview of Cst Norbert Bauer dated March 23, 2005	D. Paciocco
	204	**F-2.35.t**	P.S.U. Transcript of Interview of Cst Paul Isaak dated March 22, 2005	D. Paciocco
	205	**Q-2.89.b.37**	Winnipeg Police Service Inter-Office Memorandum - to Constable B. Neumann	D. Paciocco
	206	**Q-1.89.b.6**	Detective Sergeant A. Epp (notes)	D. Paciocco
			July 28th, 2008	
	207		WPS Photo Line-up Form dated 05-03-22 11:40 hrs Incident Number 05-017	D. Paciocco
	208		Table 1 - Personal Alcohol Consumption Chart 1	D. Paciocco
	209		Table 2 - Harvey-Zenk Alcohol Consumption Chart 2	D. Paciocco
	210	**S-99**	Correspondence	V. Clifford
	211		Curriculum Vitae – Richard J. Wolson, Q.C.	V. Clifford
	212	**R-2.91.59**	Letter from Chief Judge Wyant to Martin Minuk and Richard Wolson dated August 31, 2007	V. Clifford
	213	**R-2.91.79**	Email from Martin Minuk to Richard Wolson sent October 19, 2007 4:54 pm	V. Clifford
	214	**S-95**	Remand Memos	V. Clifford

EX ID.	EX. NO.	DISCLOSURE REFERENCE	EXHIBIT DESCRIPTION	FILED BY
			July 29th, 2008	
	215	**G.44**	Manitoba Department of Justice Prosecutions - Policy Directive Subject: Appointment of Independent Counsel (January 2005)	D. Paciocco
	216	**G.46**	Manitoba Department of Justice Prosecutions - Policy directive Subject: Laying and Staying Charges	D. Paciocco
	217	**G.45**	Manitoba Department of Justice Prosecutions - Policy Directive Subject: Conditional Sentencing (April 2005)	D. Paciocco
	218		Contacts made by Marty Minuk to D. Slough, B. Kaplan From February 25, 2005 – November 30, 2007	D. Paciocco
	219	**R-1.91.4**	Fax from Brian Kaplan to Martin Minuk dated September 21, 2005 with attached Action Route Slip	D. Paciocco
	220	**R-1.91.5**	Hard copy of email trail, last message from Brian Kaplan to Martin Minuk sent September 27, 2005 at 11:51am	D. Paciocco
	221	**R-2.91.83**	Hard copy of email trail, last message from Ron Perozzo to Martin Minuk sent October 29, 2007 at 3:57 pm	D. Paciocco
	222		Status of the Case Chart	D. Paciocco
	223	**R-1.91.10**	Letter from Provincial Judge Meyers to Martin Minuk and Richard Wolson dated February 10, 2006	D. Paciocco
	224		Section 254 of the Criminal Code	D. Paciocco
	225	**R-1.91.16**	Hard copy of email trail, last message from Brian Kaplan to Colleen Ireton sent May 12, 2006 at 3:42pm	D. Paciocco
	226	**Y-2.A** **Y-2.B** **Y-2.C**	C.V. of Brian Gover Correspondence Dated March 26, 2008 from Commission Counsel to Brian Gover Correspondence Dated June 17, 2008 constituting Brian Gover's Expert Witness Report	D. Paciocco
	227	**R-2.91.49**	Hard copy of email trail, last message from Martin Minuk to Colleen Ireton sent July 16, 2007 at 8:54 am	D. Paciocco
	228	**Y-1.A** **Y-1.B** **Y-1.C** **Y-1.D**	C.V. of Richard Peck, Q.C. Correspondence Dated March 26, 2008 From Commission Counsel to Richard Peck Enclosing Prosecutorial Standards and Ethics Materials and Soliciting Opinion Correspondence Dated June 10 from Richard Peck, Q.C., Attaching His Opinion. "Taman Inquiry Opinion" from Richard Peck, Q.C.	D. Paciocco
			July 30th, 2008	
	229		Submissions on Nature of Resolution Discussions	D. Paciocco
	230	**I.58**	Zenk Sentencing Submissions (typed notes) #1 - 9 pages	D. Paciocco
	231	**X-1.1** **X-1.2** **X-1.3** **X-1.4**	The Role of the Crown as a Minister of Justice and Officer of the Court The Role of the Attorney General and Delegation of Authority The Role of the Independent Prosecutor The Role of the Ministerial Polices	D. Paciocco

EX ID.	EX. NO.	DISCLOSURE REFERENCE	EXHIBIT DESCRIPTION	FILED BY
		X-1.5 X-1.6 X-1 X-2.7 X-2.8 X-2.9 X-2.10	The Prosecutor and Investigations The Prosecutor and Staying Charges Prosecutorial Standards and Ethics Table of Contents The Prosecutor and Conflicts of Interest The Prosecutor and Plea Bargaining Overseeing Prosecutorial Discretion The Dewar Review	
	232	P-3.88.a	Letter from D. Abra to B. Kaplan dated September 8, 2006	G. Zazelenchuk
	233	R-2.91.72	Hard copy of email from Don Slough to Martin Minuk sent September 19, 2007 at 10:52 am	B. McDonald
	234	R-1.91.3	Hard copy of email from Martin Minuk to Hymie Weinstein and Richard Wolson sent May 27, 2005 at 11:23am	G. Zazelenchuk
			July 31st, 2008	
	235	Y-3.A Y-3.B	Letter dated February 22, 2008 to Richard Peck Letter dated March 4, 2008 to Brian Gover	V. Clifford
	236	P-1.82	Correspondence from Fillmore & Riley to Commission Counsel dated Feb. 28/08 Re: Tramley Report with Attachments of Relevant Excerpts	B. McDonald
	237		C.V. of Paul A. Lobsinger along with his Opinion Evidence Relating to East St. Paul Police Investigative File and his Report Addendum dated May 8, 2008	D. Paciocco
			August 5, 2008	
	238	G.40	Fax charge sheet to Brian Kaplan for East St. Paul Police – dated March 1, 2005	D. Paciocco
	239	R-1.91.27	Letter from Darrell Madill to Mike Horn dated May 23, 2006	D. Paciocco
	240	R-2.91.65	Hard copy of email from Martin Minuk to Brian Kaplan sent September 9, 2007 at 10:11pm attaching draft submission	D. Paciocco
	241	R-2.91.80	Copy of email from Martin Minuk to Brian Kaplan sent October 20, 2007 at 4:17 am attaching letter of Richard Wolson dated October 19, 2007	D. Paciocco
	242	N.79	Appointment of Independent Counsel Review (Ruth Krindle, December 18, 2007)	S. Nozick
	226	Y-2.d	Supplementary Expert Witness Report on Prosecution Ethics and Standards dated July 9, 2008	V. Clifford
			August 6, 2008	
	243	R-1.91.15	Fax from East St. Paul Police dated 2006 04 26 attaching letter dated April 25, 2006	V. Clifford
	244	R-2.91.51	Hard copy of email from Colleen Ireton to Martin Minuk sent July 16, 2007 at 9:43 am attaching two page document title Controversial Issues Alert July 16, 2007	V. Clifford
	245	R-2.91.71	Hard copy of email from Martin Minuk to Don Slough sent September 14, 2007 at 7:48 am	V. Clifford

EX ID.	EX. NO.	DISCLOSURE REFERENCE	EXHIBIT DESCRIPTION	FILED BY
	246	**R-1.91.9**	Action Route Slip dated January 13, 2006 with attached letter from Victoria Sveinson	V. Clifford
	247	**M.76.a**	Media Article-Canoe - Cnews dated March 2, 2005 - Cop faces charges	G. Zazelenchuk
	248	**M.76.c**	Media Article-Canoe - Cnews dated March 3, 2005 - Crash victim	G. Zazelenchuk
	249	**Q-2.89.b.30**	Email From Art Stannard to Doug Webster, Corrine Scott sent March 11, 2005	D. Paciocco
	250	**I.54**	Medical Report- Letters of Reference - Written Material filed by R. Wolson	D. Paciocco
	251		Statement of Jerome Mauws	D. Paciocco for B. McDonald
			August 12, 2008	
	252		Letter from D. Slough to Commission Counsel dated August 8, 2008	G. McFetridge

If unable to view the exhibits online, please contact the Department of Justice in writing at:

Department of Justice
Administration and Finance
1110 – 405 Broadway
Winnipeg, MB R3C 1L6

TABLE 1 Winnipeg Professional Standards Unit Interviews on Personal Alcohol Consumption

OFFICER	BRANIGANS	BLACKS
Jim Anderson **Volume F-2.35.r**	**Page 1130 – Line 14:** I consumed some beer there, and then over a period of time, I would say this is, I believe it **was three, it may have been two, but it was probably three beer**, interspersed each one with a glass of water.	**Page 1131 – Line 16:** There was alcohol there. Speaking for myself, **I believe** I **had a couple of drinks**, two or so, again, over that period of time.
Ken Azaransky **Volume F-1.35.a**	**Not Asked**	**Page 863 – Line 4:** **I had rye and Coke.** **Page 863 – Line 15:** So no one, I don't think anybody gave me an open offer, but it was assumed if I wanted to have a drink, I could have a drink. So I grabbed a glass and had a drink.
Norbert Bauer **Volume F-1.35.b**	**Page 882 – Line 13 :** I sat at the table on the side, had some chicken wings, **had a drink**, and then a group of us went over to Sean Black's later -- went over to Sean's	**Page 882 – Line 18:** So I went over to Sean's **and had a drink over at** Sean's place, and I left at about, I don't know, 5:00, 5:30 in the morning, something like that, from Sean's place
Sean Black **Volume F-1.35.c**	**Not asked**	**Page 909 – Line 23:** At my place **I had a couple of drinks.** Maybe -- I wasn't drinking heavy, we had work the next day and we were coming in to do an overlap, so I wasn't interested in drinking lots there
Tracy Fudge **Volume F-1.35.e**	**Not asked**	**Not asked**
Dave Harding **Volume F-1.35.g**	**Not asked**	**Page 963 – Line 16:** I had a couple of ryes.
Chris Humniski **Volume F-2.35.s**	**Page 1149 – Line 16:** And I attended at Branigan's just after 1:00, so I was there maybe an hour, and had some wings **and a couple of drinks**	**Page 1147 – Line 21:** And for myself, I **had a couple of drinks** and then I ended up leaving

Kelly McLure **Volume F-1.35.i**	**Page 993 – Line 10:** And we had wings and a couple of drinks, or I had wings **and a couple of drinks**. **Page 1001 – Line 6:** I wasn't drinking that much that night. **Like I had a beer and a half at Branigan's, and then I had a little drink there.**	**Page 1001 – Line 4:** When I was at Sean Black's, **I know I had one drink of, like a little bit of Bailey's with milk**. I wasn't drinking that much that night. **Like I had a beer and a half at Branigan's, and then I had a little drink there.**
Jack Spruyt **Volume F-2.35.n**	**Page 1076 – Line 15:** I went there, **had a few beers**, some wings.	**Not asked**
Jay Nolet **Volume F-2.35.l**	**Not asked**	**Not asked**
Jacek Kapka **Volume F-1.35.h**	**Not asked**	**Not present**
Sammi Haddad **Volume F-1.35.f**	**Page 948 – Line 16:** **I just had water** and that's it.	**Not present**
Christian Guyot **Volume F-2.35.v**	**Page 1205 – Line 3:** Approximately **four beers**	**Not present**
Ted Michalik **Volume F-2.35.j**	**Page 1015 – Line 24:** I had **a few beers** and some wings, and then would have left at about 2:00, or just prior to 2:00 in the morning	**Not present**
Daniel Mikawoz **Volume F-2.35.u**	**Page 1188 – Line 5:** **I had three**. [beers]	**Not present**
Jules Buors **Volume F-1.35.d**	**Page 922 – Line 11:** **I ordered a beer** and some wings. There was some other	**Not present**
Marnie Nechwediuk **Volume F-2.35.x**	**Page 1235 – Line 21:** And I ordered **a Diet Coke** because I wasn't drinking that night. **Page 1235 – Line 25:** I had ordered **one beer that night, which I had actually bought for a fellow officer**, Constable Azaransky.	**Not present**

Brian Neumann **Volume F-2.35.k**	**Page 1028 – Line 15:** While I was there I had, I'm not a drinker at all, so I just had **a couple of cokes** and 20 wings, and I was there for approximately an hour and left shortly after 1:00 o'clock.	**Not present**
Gord Schneider **Volume F-2.35.m**	**Not asked**	**Not present**
Lloyd Swanson **Volume F-2.35.o**	**Page 1095 – Line 14:** I was going to buy a jug for the table, top up whoever needed some, but the staff there said it was cheaper if you bought individual glasses. So I bought a number of glasses, and I ordered some wings, sat down. **The glasses were all put on the table. I took one of them**.	**Not present**
Werner Toews **Volume F-2.35.p**	**Not asked**	**Not present**
Shaun Veldman **Volume F-2.35.q**	**Page 1124 – Line 2:** My partner, **Dan, paid for my drink** and I had a plate of wings, and he paid for that, so he looked after my tab.	**Not present**
Al Williams **Volume F-2.35.w**	**Page 1219 – Line 5:** Every time it is **the same thing, every time I go there, three beer**, 20 wings.	**Not present**

TABLE 2 Winnipeg Professional Standards Unit Interviews on Derek Harvey-Zenk / Alcohol Consumption

OFFICER	BRANIGANS	BLACKS
Jim Anderson **Volume F-2.35.r**	**Not asked**	**Page 1135 – Line 14:** I know what I drank, and **I wasn't aware of what anyone else drank.**
Ken Azaransky **Volume F-1.35.a**	**Page 859 – Line 25:** You know, **I didn't see what he was drinking and**, you know, aside from knowing that we usually go there for wings, I didn't see him eating them.	**Page 869 – Line 10:** Well, **at the end I know he wasn't drinking**, we were just sitting around sort of at the kitchen table, sort of shooting the shit, so to speak.
Norbert Bauer **Volume F-1.35.b**	**Page 884 – Line 13, 16:** **No... No. Like I said, I couldn't even tell you.** Like I don't know him very well and he wasn't at my table, so I have no idea.	**Page 886 – Line 8:** You know, **I'm not really paying attention to what everyone else** does, but if someone was stumbling around and tipping over chairs and things like that, that would make me take notice, no.
Sean Black **Volume F-1.35.c**	**Page 900 – Line 3:** No. No, I was – most of us go there for wings, so I would assume he had probably been eating chicken wings. **But drinking, no, no idea.**	**Page 911 – Line 23:** **No.** [In response to question, do you know how much Derek had to drink.]
Tracy Fudge **Volume F-1.35.e**	**Page 933 – Line 21:** **I have no idea.**	**Page 936 – Line 2:** There was some rye out and Bailey's out. There was people drinking, but **again I wasn't paying attention to that,** what everyone else was drinking.
Dave Harding **Volume F-1.35.g**	**Page 959 – Line 17 to 24:** 17 - **No idea.** [number of drinks] 20 - **No idea.** [what he was drinking] 23 – Food, I could tell you he had 40 wings. **Page 960 – Line 22:** No, I couldn't tell you that.	**Page 963 – Line 21:** **I didn't notice.**
Chris Humniski **Volume F-2.35.s**	**Page 1152 – Line 24:** **At Branigan's definitely not** because I wasn't there with him. [in response to question would you have any idea how much he had to drink at Branigans and Sean Blacks]	**Page 1153 – Line 15:** **I really didn't even notice him** there in the group. [in response to question how much he drank at Sean Black's while the witness was there]

Kelly McLure **Volume F-1.35.i**	**Page 997 – Line 19:** **No, you know what, I don't know, I wasn't paying attention**. I know he had wings because. I just remember. I'm pretty sure I saw him have wings, because, yeah, pretty sure. But I don't recall if he had any – I don't recall if he had any alcoholic beverages in front of him.	**Page 998 – Line 25:** And I do recall at that point he was fine and **I didn't notice if he was drinking or not. I couldn't say one way or another at Branigan's.** **Page 999 – Line 18:** Fine. It was an intelligent conversation, I wouldn't have even – like I said, **I didn't see him specifically with any drinks**, but at that point I wouldn't have, you know, if we would have been anywhere, it would have been just like any conversation that I ever had with him at work or anywhere so—
Jay Nolet **Volume F-2.35.i**	**Page 1046 – Line 16:** **I have no idea. I don't know. I didn't pay attention to how much he was drinking**. I know he did consume alcohol, but I don't know how much. I wasn't keeping track. As for wings, I could say he holds the record for 62 wings, so he probably consumed a lot of wings.	**Page 1049 – Line 24:** **I don't know. I wasn't paying attention to who was drinking and who wasn't.**
Jack Spruyt **Volume F-2.35.n**	**Page 1081 – Line 16:** **No, I did not, no** [in response to question did you know or see what he was drinking] **I have no idea.** [in response to the question about the amount he drank]	**Page 1084 – Line 20:** **Not that I noticed. Like I don't know,** I'm not going to say so and so was drinking because I don't know if they were or not. **Page 1085 – Line 1:** In general? There were glasses out **and I honestly couldn't tell you if there was alcohol in them or not** **Page 1085 – Line 10:** **I really wasn't paying attention**
Ted Michalik **Volume F-2.35.j**	**Page 1018 – Line 22:** **I couldn't see how many, how much he was drinking.** I noticed he had a beer in front of him, and also noticed that he ate about 40 wings	**Not present**
Daniel Mikawoz **Volume F-2.35.u**	**Page 1189 – Line 7:** **No idea actually, I believe it was beer, but I don't know.** [in response to question can you tell us what he was drinking] **Page 1189 – Line 14:** **No.** [in response to question do you know how many beverages he had that evening]	**Not Present**
Jules Buors **Volume F-1.35.d**	**Page 922 – Line 18:** And **I'm guessing at what was in front of him as far as liquor goes,** and I believe it was some kind of draft beer **Page 925 – Line 4:** I remember from past times we have been there and other places he always drinks beer, so I'm leaning towards the draft beer. I can honestly say that I don't think he finished a full glass	**Not present**

	the whole time I was there, it is hard to believe but I can't remember. I can't remember any -	
Marnie Nechwediuk Volume F-2.35.x	**Page 1240 – Line 8:** I know for sure there was a beer in front of him **[but I don't know how many he had**. and that he ordered 20 wings for sure. [in response to question do you know if he was consuming alcohol] **Page 1240 – Line 22:** It was in a glass [in response to question whether it was bottles or draft]	**Not present**
Jacek Kapka Volume F-1.35.h	**Page 980 – Line 19:** **No.** [in response to question did you notice what Derek was drinking.]	**Not present.**
Sammi Haddad Volume F-1.35.f	**Page 946 – Line 21:** **No clue.**	**Not present**
Christian Guyot Volume F-2.35.v	**Page 1205 – Line 10:** **No.** [in response to question were you sort of able to see what he consumed] **Page 1210 – Line 25:** **I have no idea** [in response to question, what was he drinking]	**Not present**
Brian Neumann Volume F-2.35.k	**Page 1030 – Line 22:** I didn't see Derek eating anything, but I did notice that he had a large plate in front of him already eaten chicken wings. **Page 1031 – Line 3:** During the period of time **I was there I didn't see him drink anything**, and I am sure I didn't see him order a drink during that period of time.	**Not present**
Gord Schneider Volume F-2.35.m	**Page 1067 – Line 2:** You know, I have gone over this earlier, just to try to remember seeing him drinking and that **And to be honest, I only saw a glass in front of him. I didn't actually ever see him touch it**. I am sure he probably had a drink there, but I did not ever see him raise a glass, because he was eating chicken wings all night there, and they were joking about how he had eaten 60 chicken wings one previous evening. And I can honestly say I never saw him raise a glass to his lips there. Even though I know there was a glass in front of him. **No, I don't know what he was drinking**	**Not present**

Lloyd Swanson **Volume F-2.35.o**	**Page 1098 – Line 17:** When I got there, sat down, got my wings. Harvey had a plate of wings with him and what appeared to be, I'm guessing, a draft. It was in a draft glass and it looked like draft so.	**Not present**
Werner Toews **Volume F-2.35.p**	**Page 1111 – Line 19:** As far as drinking goes, again, his back was towards me and I was sort of facing off to the side, so I am not sure, I can't say 100 per cent sure what he was drinking. There were some beer glasses on the table, but I can't say that I saw him drinking	**Not present**
Shaun Veldman **Volume F-2.35.q**	**Page 1123 – Line 6:** No, I don't [in response to the question do you know what he was drinking that night]	**Not present**
Al Williams **Volume F-2.35.w**	**Page 1224 – Line 14:** Beer [in response to question what was he drinking] **Page 1226 – Line 13:** No, I have no idea. [in response to question any idea how many he consumed]	**Not present**

TAMAN INQUIRY

Members of the Commission

The Commissioner

Honourable Roger Salhany, Q.C.

After obtaining a law degree from Osgoode Hall in 1961, the Honourable Roger E. Salhany, Q.C. attended Cambridge University for post graduate studies in criminal procedure under Professor Glanville Williams, where he obtained a diploma in Comparative Legal Studies in 1962.

For 16 years he practised general litigation, specializing both in criminal defence and acting as a Federal prosecutor. In 1975 at the age of 37, he was elected the youngest Bencher of the Law Society at the time. He was a sessional lecturer in criminal procedure at the University of Windsor from 1977 to 1979, a lecturer in the Bar Admission course from 1968 to 1978 and a lecturer for the Federation of Law Societies from 1972 to 1979.

In 1978, he was appointed a judge of the Ontario County Court and became a judge of the Ontario Superior Court in 1990 when the two courts merged. From 1979 to 1999, he was a lecturer on criminal law, procedure and evidence for the Ontario Provincial Police, the Conference of Ontario Boards and Agencies, the Canadian Judicial Council and the National Judicial Institute.

He is the author of eight books on criminal procedure, criminal evidence, the Charter of Rights and Freedoms, arrest, seizure and interrogation by the police and civil practice.

He retired in 1999 and subsequently became a member of the Pension Appeals Board which hears appeals under the Canada Pension Plan.

Commission Counsel

David M. Paciocco

David M. Paciocco (LL. B.,Western 1979; B.C.L., Oxford, 1981; LL.D (hon. causa) Laurentian University, 2005) is a Professor of Law at the University of Ottawa where he teaches Evidence, Criminal Law and Trusts.

Professor Paciocco was a part-time assistant prosecutor in Ontario from 1986 to 1990, and a full-time prosecutor, on leave from the University of Ottawa, from 1991 to 1993. Since 1993, he has continued full-time at the University of Ottawa while acting as counsel to the criminal law defence firm of Edelson and Associates. He has acted in many high profile cases, specializing in complex motions and appeals.

Professor Paciocco has appeared before the Supreme Court of Canada, the Ontario Court of Appeal, the British Columbia Court of Appeal, the Saskatchewan Court of Appeal, and the International Criminal Tribunal for Rwanda.

The author of several books and more than 100 legal articles, he is the recipient of a number of teaching and writing awards, including a 1999 Donner Prize for writing in public policy and the Attorney-General of Ontario's Mundell Medal 2002 for his contribution to law and letters. He also served as the Chief Justice J.V. Milvain Visiting Chair in Advocacy at the University of Calgary, Faculty of Law, 2004. His research has been cited on numerous occasions by the Supreme Court of Canada and other Canadian courts, by the Privy Council, and by courts in New Zealand and Australia.

He is legal counsel to the Ombudsman of Ontario, and has acted as a consultant to the government and to media on criminal law matters, and is a frequent lecturer at judicial and professional education seminars. Most recently Professor Paciocco acted as the section 696.3(3) delegate of the Minster of Justice conducting the review into the wrongful conviction of David Mullins-Johnson.

Associate Commission Counsel

W. Vincent Clifford

W. Vincent Clifford (B.Sc. Honours, 1986, Saint Mary's University; LL.B. 1989, Dalhousie Law School) was admitted to the Law Society of Upper Canada in 1991. He is the senior associate in the law firm of Edelson and Associates where he conducts a criminal litigation practice that includes the defence of charges under Canadian Federal statutes, including the Criminal Code of Canada. He also acts as counsel in Provincial regulatory proceedings and Coroner's inquests.

His practice focuses primarily on trial advocacy. He has acted as counsel in many high profile and complex criminal cases. He also has extensive experience and expertise in successfully arguing constitutional issues that involve the violation of rights and freedoms guaranteed under the Canadian Charter.

He was a senior instructor for the Criminal Law component of the Law Society of Upper Canada Bar Admission Course (Ottawa) in 2001 through 2005. He has been a frequent guest lecturer at the University of Ottawa Law School, Carleton University Law program and Algonquin College. He has presented numerous papers on criminal law matters to various legal and academic audiences. He has also been designated by the Law Society of Upper Canada as a Certified Specialist in Criminal Law.

He is currently enrolled in the Faculty of Graduate Studies at Osgoode Hall Law School, York University, where he is completing his Masters Degree, specializing in criminal law.

Chief Administrative Officer

R. L. (Bob) Giasson

Retired from Manitoba Department of Justice on December 31, 1999 as the Acting Assistant Deputy Minister, Courts Division. He was responsible for the management and leadership of the Courts Division by promoting the effective, impartial and efficient administration of the judicial process to serve the needs of Manitobans involved in criminal, civil and family disputes before the courts.

With over 35 years of service in Courts he held various positions including Registrar Court of Queen's Bench, Executive Director of Winnipeg Courts, Magistrate, Inspector of Courts of Manitoba and French Language Services Co-ordinator for the Manitoba Court system. He is an honorary life member of the Association of Court Administrators of Canada [ACCA].

In 2006 he was appointed Chief Administrative Officer of the Driskell Inquiry.

Administrative Staff

Melissa Braun - Administrative Assistant
Wendy Bergmann - Administrative Assistant
Evelyn Kampen - Clerical Support

Court Reporters

Celia Reid
Debra Kot
Lisa Reid

Court Clerks

Sharleen Reid
Kim Pohorily
Alnie LeBlanc

Sheriff Officers

Charissa Van Dorp
Kris Hebert
John Stepaniuk
Gerhard Schmidt
Paul Heinl

On December 5, 2007 the Attorney General of Manitoba announced the appointment of the Honourable Roger Salhany, Q.C., to conduct an inquiry into the investigation, prosecution and justice services provided to the families in relation to the death of Crystal Taman.

The commission was given the responsibility to inquire into the conduct of the police investigations surrounding the death of Crystal Taman, and to consider whether all aspects of the Crown's position on sentence, were conducted in accordance with the professional and ethical standards expected of lawyers and agents of the Attorney General. It was also to inquire whether the services provided to the family of Crystal Taman were sufficient having regard to the requirements of *The Victims' Bill of Rights.*